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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF CHANCERY
OF THE
STATE OF NEW YORK.

By ALONZO C. PAIGE,
COUNSELLOR AT LAW.

SECOND EDITION,

With Notes and References,

By ROBERT JOHNSTONE,
COUNSELLOR AT LAW.

VOLUME I.

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Rec. Oct 7, 1848

CHANCELLOR
AND
JUDGES OF THE COURTS OF EQUITY
OF THE
STATE OF NEW YORK,
DURING THE PERIOD OF THESE REPORTS.

~~~~~  
**REUBEN H. WALWORTH, CHANCELLOR.\***  
~~~~~

J U D G E S :

FIRST CIRCUIT,
OGDEN EDWARDS.

SECOND CIRCUIT,
JAMES EMOTT.

THIRD CIRCUIT,
WILLIAM A. DUER.

FOURTH CIRCUIT,
ESEK COWEN.

FIFTH CIRCUIT,
NATHAN WILLIAMS.

SIXTH CIRCUIT,
SAMUEL NELSON.

SEVENTH CIRCUIT,
DANIEL MOSELY.†

EIGHTH CIRCUIT,
ADDISON GARDINER.‡

* The HON. REUBEN H. WALWORTH was appointed Chancellor on the 19th of April, 1828, in the place of the HON. SAMUEL JONES, appointed Chief Justice of the Superior Court of the city of New York.

† DANIEL MOSELY, counsellor at law, was appointed Judge of the Seventh Circuit, on the 16th of January, 1829 in the place of the HON. ENOS T. THROOP, elected Lieutenant-Governor of the State.

‡ ADDISON GARDINER, counsellor at law, was appointed Judge of the Eighth Circuit on the 25th of September, 1829, in the place of the HON. JOHN BIRDSALL, resigned.



CHANCELLOR WALWORTH'S

A D D R E S S T O T H E B A R ,

ON ASSUMING THE DUTIES OF HIS OFFICE.

Delivered April 28th, 1828.

Gentlemen of the Bar:

IN assuming the duties of this highly responsible station, which at some future day would have been the highest object of my ambition, permit me to say, that the solicitations of my too partial friends, rather than my own inclination or my own judgment, have induced me to consent to occupy it at this time.

Brought up a farmer until the age of seventeen, deprived of all the advantages of a classical education, and with a very limited knowledge of Chancery law, I find myself, at the age of thirty-eight, suddenly and unexpectedly placed at the head of the judiciary of the State; a situation which heretofore has been filled by the most able and experienced members of the profession.

Under such circumstances, and when those able and intelligent judges, who for the last five years have done honor to the bench of the Supreme Court, all decline the arduous and responsible duties of this station, it would be an excess of vanity in me, or any one in my situation, to suppose he could discharge those duties to the satisfaction even

of the most indulgent friends. But the uniform kindness and civility with which I have been treated by every member of the profession, and in fact by all classes of citizens, while I occupied a seat on the bench of the Circuit Court, afford the strongest assurance that your best wishes for my success will follow me here. And, in return, I can only assure you, that I will spare no exertions in endeavoring to deserve the approbation of an enlightened bar, and an intelligent community.

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CASES IN CHANCERY.

VAN RENSSELAER AND OTHERS v. MORRIS.

A receipt is always susceptible of explanation.

An agent being dead, a written statement of an account made by him at the time of a settlement, is evidence against the principal.

The probate of a will of personal property, is evidence of the due execution of the will.

The assignment by a trustee, as security for his private debt, of a bond and mortgage belonging to the trust fund, will make such trustee chargeable for the value of such bond and mortgage at the time of such assignment, with interest thereon.

And such trustee will be so chargeable, although the mortgagor should, subsequent to such assignment, become insolvent, and the mortgaged premises be insufficient to discharge the mortgage debt.

Where letters of administration, with the will annexed, are granted, and the will having been made in a foreign country, remains as a record in some public office there, the proper course is to annex an authenticated copy of the will to the letters of administration.

THE bill in this cause was filed against the defendant for 1828, April 28. an account, as trustee of John Cullen, deceased; James Van Rensselaer, one of the complainants, being the administrator with the will annexed, and the other complainants the devisees and legatees of Cullen. The principal question in the cause was, whether the avails of 26 lots of land in the city of Albany, belonging to the trust fund, were included in a settlement of the trust property made on the 11th November, 1822, between James Van Rensselaer, one of

1828. the complainants, and Arthur Breese, the attorney and agent
 Van Rensselaer v. Morris. of the defendant; at which time Van Rensselaer gave Breese
 a receipt in full of all demands against the defendant, as the
 trustee of Cullen. The defendant in his answer, admitted
 that he did, in 1814, assign to one Lenox, as collateral secu-
 rity for his private debt, a bond and mortgage taken from
 [*14] *the purchaser on the sale of the Albany lots. The mort-
 gagor afterwards, in the year 1817, became insolvent.
 Cullen died at Aux Cayes, in the island of St. Domingo.
 Previous to his death, he made his will. The executor
 named in the will renounced, and letters of administration
 were, on the 2d September, 1820, granted to James Van
 Rensselaer, by the court of probates of this state.

Platt, for complainants.

Kane, contra, cited *Van Devort v. Smith*, (2 Caines, 155;) *Uterson v. Mair*, (2 Ves. jun. 95;) *Alsager v. Rowley*, (6 Ves. 748;) *Burroughs v. Elton*, (11 Ves. 29; 1 Mad. 80;) *Chambers v. Goldwin*, (9 Ves. 266;) *Taylor v. Hayling*, (2 Brown's Ch. C. 435;) *Taylor v. Hayling*, (1 Cox, 435;) *Drew v. Porter*, (1 Sch. & Lef. 182, 192;) *Fairlie v. Hastings*, (10 Ves. 123;) (Bull. N. P. 282; 1 Phil. Ev. 207;) *Alland v. Jordan*, (1 Vern. 161;) *Anderson v. Maltby*, (2 Ves. jun. 243; *Dunbar v. Lem and others*, (6 Brown's Par. C. 503;) *Chappedelane v. Decheneaux*, (4 Cranch, 309, per Marshall, C. J.) *Willis v. Jernegar*, (2 Atk. 251;) *Tickel v. Short*, (2 Ves. sen. 239;) *Freeland v. Heron and others*, 7 Cranch, 147;) *Chambers v. Goldwin*, (5 Ves. 837;) *Gray v. Minnethrope*, (3 Ves. 103;) *Pickering v. Lord Stamford*, (2 Ves. jun. 280, 582-3;) Mad. 79.

THE CHANCELLOR:—From the exhibits and proofs in this case, taken in connection with the defendant's answer, there cannot be a doubt that no specific settlement or account has ever been made or rendered, in relation to the twenty-six lots of land in Albany. It is not even pretended by the defend-

ant in his answer. He says, generally, that the first receipt embraced transactions relative to the trust property. But his letter of November, 1826, even as explained by his answer, shows clearly that it could not have been settled at the time of giving the first receipt, although the bond and mortgage of Kane had at that time been assigned to Lenox. I am equally well satisfied it was not included in the settlement with Breese. Although the terms of the receipt given on that occasion by Van Rensselaer, may be broad enough to *cover a general settlement of the trust property, yet the same language might well have been used, if a settlement of the Crosby manor concern, only, was intended by the parties. It is not an instrument of which the court is bound to give a legal construction, which must be conclusive as to the intent. A receipt is always subject to explanation, and to have its general terms narrowed down by proof *aliunde*. [1] Although the defendant in his answer to the bill, insists that there was, at that time, a final settlement of the whole subject, he cannot be considered as swearing to a fact within his own knowledge. He was not present, and undoubtedly refers to the receipt taken by his agent, as the evidence which has satisfied his mind that it was a general settlement. If he had so considered it in November, 1826, he would not have written the letter of that date; and although he did not then recollect the terms of the receipt, if he had ever heard from his agent that he had settled for the Albany lands, that circumstance would not have been so soon effaced from his memory. Again; it does not appear by the power of attorney, which is among the exhibits, or otherwise, that Breese ever had anything to do with the Albany lots. Independent, therefore, of the written statement of the agent, who died more than a year before this controversy commenced, I should be satisfied

1828.

Van Rensselaer
v.
Morris.

[*15]

[1] 1 Cowen & Hill's notes to Phil. Ev. 381; 2 id. 581, 582; *Fuller v. Ortlenden*, 9 Conn. 401; otherwise if the receipt is in the nature of a contract; *Goodyear v. Ogden*, 4 Hill, N. Y. R. 104; *Dawson v. Kittle*, id. 107.

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 Van Rensselaer
 v.
 Morris.

the Albany lands were not included in the settlement. But Mr. Breeze's written statement of the account is conclusive as to that fact, and I can see no legal objection to its admission as evidence. I think, under the circumstances in which it is found, it must be taken to be the statement of the account, as entered on the agency book at the time of the settlement, and therefore a part of that settlement. If so, it certainly would be legal evidence against the principal, if the agent was now living; it being part of the *res gestæ*. [1] (1 Phil. Ev. 77.)

[*16]

It is objected, on the part of the defendant, that there is no proof of the will of John Cullen. This objection is one of form, rather than of substance. Mrs. Van Rensselaer, being the only surviving relative of her brother, at the time of his death, if she and her children are not entitled to the property under the will, she would be entitled to the whole *under the statute of distributions. But the probate of a will of personal property is at least *prima facie*, if not conclusive evidence of the due execution of the will. [2] In *Baile v. Butterfield*, (a) Lord Kenyon held that probate being granted as of a will and codicil, it was conclusive evidence, as to the fact of there being two distinct instruments. The letters of administration, with the will annexed, granted by the late court of probates, is somewhat informal, but is sufficient to render it valid, until revoked. I am bound to presume that the will annexed to the letters of administration was duly proved, that the court had legal evidence of the correctness of the translation, and that the original will was so situated that it could not be obtained here. It being made before a notary, in an island where the civil or French law prevails, the original, probably, must always remain there as one of the records of his office. In such a case, the

(a) 1 Cox's Ca. 392.

[1] 1 Phil. Ev. (8d ed.) 364.

[2] *Collon v. Ross*, 2 Paige, 396; *Bogardus v. Clark*, 4 id. 623.

proper course is to annex an authenticated copy to the letters of administration.

1869.

The People
v.
Norton.

It must, therefore, be referred to a master, to take an account between the parties in relation to one fourth of the proceeds of the Albany lots. I do not think the complainants have shown enough in this case to authorize the opening of the account generally. The assignment of Kane's bond and mortgage to Lenox, for the private debt of the defendant, was such an unwarrantable use of the trust fund, as to make him chargeable with the actual value of one fourth of that bond and mortgage, at the time of such assignment, with the interest thereon from that time.

The question of costs, and other questions and directions are reserved.

*THE PEOPLE v. NORTON AND OTHERS.—THE SAME v.
THE SAME.

[*17]

As a general rule, a receiver should not be appointed without notice to the parties interested.

But this rule is subject to exceptions in special cases, where irreparable injury would be sustained by the delay.

So a receiver will be appointed without notice, upon the application of the complainant, where the defendant has absconded, to prevent service of the subpoena to appear and answer the bill: or has left the state, and is not expected to return for several months, and has no residence or place of business where a subpoena can be served.

The defendant, however, has a right afterwards, to apply for relief against the order appointing such receiver.

THE CHANCELLOR:—In these cases, application is made April 28th. for the appointment of a receiver of the rents and profits of certain lots in the city of New York, which, by inquest of office, have been found to have escheated to the people of this state.

The facts disclosed in the respective bills, together with

1828.
 The People
 v.
 Norton.

[*18]

the affidavits on which the motions are founded, show the propriety and necessity of the appointment; and the only difficulty in my mind has been in relation to want of notice to the defendant Norton. As a general rule, a receiver should not be appointed without notice to the opposite party; but that rule must be subject to exceptions in special cases, where irreparable injury would be sustained by one or both parties, by such delay.[1] In *Maguire v. Allen*, (1 Ball & Beatty, 75,) a receiver was appointed on the application of the plaintiff, where the defendant had absconded to prevent service of the subpoena to appear and answer the bill. In these causes, the defendant, who has traversed the finding of the jury, has left the state, and is not expected to return for several months, and has no residence or place of business, where a subpoena can be served. His solicitor, who was employed on the traverse, on being applied to, refuses to appear or do anything in these cases, on the ground that he is not authorized; and it is necessary that *the receiver should be appointed without delay, to collect the rents of the tenants, which may be lost by a delay of a few days.

Under these circumstances, I think these are proper cases for the court, in the exercise of a sound discretion, to dispense with the formality of the notice, and make *ex parte* orders for the appointment of receivers; saving to the defendant the right hereafter to apply for relief against the order, if he can show any good reason, on the merits, for discharging the same.

[1] *Sandford v. Sinclair*, 8 Paige 373; *Olson v. Martin*, id. 481.

1828.

McLaren
v.
Hopkins.

McLAREN v. HOPKINS, IMPLEADED WITH CARPENTER.

Where the only interest a witness has in a cause in which he is sworn, is in the question, the objection goes to his credibility, and not to his competency.

An interest to exclude a witness from being sworn, must be a direct interest in the event of the suit.

Where M. purchased the interest of C. in certain mortgaged premises under a judgment and execution, in a suit by M. against H., who pretended to hold a subsisting mortgage against the premises given by C., it was held that C. on being released by M., was a competent witness to prove that the mortgage had been paid.[1]

THIS cause, and the previous proceedings in it, are contained in 4 Cowen's R. 667, and 1 Hopkins' R. 576.

THE CHANCELLOR:—This cause has been repeatedly before this court, and once before the Court of Errors. (4 Cowen's Rep. 667.) In pursuance of the order of this court, of the 25th of August, 1825, (1 Hopkins' Rep. 579,) made by the consent of the parties, a feigned issue was awarded, to determine the question whether the mortgage, which is the subject of controversy in this suit, was paid and satisfied to Hopkins, by Enos Cook the mortgagor. This issue was tried before Judge Throop, at the Onondaga circuit, in October, 1826; when the jury found that the mortgage had *been paid. A motion is now made by Hopkins for a new trial; which is submitted on written briefs, and the following points alone are relied on by the defendant's counsel;

1st. That Enos Cook was an incompetent witness for the plaintiff, on the ground of interest.

2d. That the verdict was against evidence.

[1] By secs. 398, 399, of the N. Y. Code, interest will not exclude a witness, unless he is a party, or the person for whose immediate benefit the suit is brought. See *Washington Bank v. Palmer*, 2 Sanf. L. C. Rep. 686.

1828.

McLaren
v.
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Cook, who is insolvent, and by whom the mortgage was given to secure the payment of a previous bond, was called as a witness for the plaintiff, who had purchased his interest in the mortgaged premises under a judgment and execution. Being objected to by the defendant's counsel, the plaintiff executed to the witness a formal release of all claim which she had or might have against him on account of the mortgaged premises, and the judge then decided he was a competent witness. In this opinion of the circuit judge, I fully concur. The only interest which Cook could have, after the release, was an interest in the question, which would go to his credibility, and not to his competency. Under the particular circumstances of this case, it may be even doubtful whether his interest in the question is not equally balanced. It has been so repeatedly decided in our own courts that nothing but a direct interest in the event of the suit will disqualify a witness, that it is unnecessary to waste time in discussing that question. Cook's rights cannot be affected by the event of this suit. Even if the mortgage is ordered to be delivered up and cancelled, he will still be liable to Hopkins on his bond, or on his contract of the 26th of February, 1816; and the decree in this cause could not be given in evidence in his favor to defeat a recovery.

On the other point, I am fully satisfied with the verdict of the jury. This court undoubtedly has, in most cases, the right to determine the facts, without the intervention of a jury; and even after a feigned issue awarded and tried, may award new trials, until it is perfectly satisfied with the verdict. But on a mere question of fact, the court ought to be dissatisfied with the finding of the jury, or have some reason to believe injustice has been done, before it grants a new trial. So far from being dissatisfied with the verdict in this case, I think the court must have come to the same conclusion, if it *had decided the facts without the aid of a jury. The positive testimony of Cook is very strongly corroborated by that of Mosely and Sergeant, laying out

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of view the testimony of Giddings, whose credibility is somewhat shaken. The settlement made with Cook, in January, 1817, and the declarations made by him after he was insolvent, and when his property had been sold and bid in by the plaintiff under her judgment, can have but little weight, when placed in opposition to the positive testimony of the witnesses, and the common sense view of the contract of February, 1816, when neither party had any interest in giving a false coloring to that transaction.

On the whole, I am perfectly satisfied with the verdict, both on the question of law and the matters of fact; and a new trial is consequently refused.

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Where it is sought to charge lands with a legacy, it seems that the legatee is a necessary party.

Although one legatee may file a bill in favor of himself and all others who might choose to come in under the decree, yet the bill must state the fact that it is filed in behalf of the complainant and all others, &c.

Where a trustee prosecutes a claim for the benefit of the *cestui que* trust, the latter must be made a party.

A grantor of lands has an equitable lien on the estate sold for the payment of the purchase-money; and this lien is not waived by the grantor's taking the mere personal security of the purchaser only, unless there is an express agreement between the parties that the equitable lien be waived. But wherever any security is taken on the land sold, or otherwise, for the whole or a part of the purchase-money, the equitable lien will be waived, unless there is an express agreement that it shall be retained.

So the lien is waived where a note or bond is taken of the vendee for the purchase-money, in which a third person joins as security.

Likewise, if the vendee sells to a third person, without notice, the lien is lost.

ON the 10th day of February, 1813, Samuel Howland, May 13th. then about 86 years of age, conveyed his farm to the defendant, Daniel Howland, his grandson, with whom he

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expected to reside the remainder of his life ; and took back a life lease, at a nominal rent. He also took from Daniel a bond of the *same date, which, after reciting that the farm was leased to Samuel Howland, during his natural life, with the intent, however, that Daniel should occupy it so long as he should maintain, sustain and decently support his grandfather, during his natural life, was conditioned to pay to Jonathan Howland \$340, as a legacy from Samuel Howland, within one year from the death of the said Samuel. The mother of Daniel Howland, together with her children, continued to reside on the farm, Daniel and Pontus taking charge of the same, and their grandfather resided with them until November, 1819 ; when Daniel, having become intemperate and troublesome, the old gentleman left them and went to reside with his son in law, the complainant, who supported him till his death, in 1825. In 1816, Daniel conveyed to Pontus, his brother, one half of the farm, on the same terms and conditions as those on which he received it, and took from him a bond, as to one half of the legacy, &c., similar to that which had before been given to the grandfather, by himself. On the 16th of November, 1819, while Daniel was confined by a broken leg, the complainant, as he alleges, by direction of Samuel Howland, went to the house on the farm, where the Howlands, with their mother, resided, and procured from Daniel an assignment of the bond of Pontus Howland ; and also obtained from him the original deed from Samuel Howland, with a release thereon, in the words and figures following : " Know all men by these presents, that I, Daniel Howland, of the town of Washington, have remised, released and forever discharged, and by these presents, do, for me, my heirs, executors and administrators, remise, release and forever discharge Samuel Howland, of the same town, his heirs, executors and administrators, of and for all and all manner of actions, suits, debts, dues, sums of money, accounts, recognizances, bonds, bills, specialties, covenants, contracts, controversies, agreements,

claims and demands whatever, in law and equity, which against the said Samuel Howland I ever had, now have, or which I, my heirs, executors or administrators hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever, *from the beginning of the world to this day of the date of these presents. Dated November the 16th, in the year 1819.

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DANIEL HOWLAND, [L. s.]

Witness present, Peter Fish, Fanny Howland.

The complainant alleges that the above release was executed in pursuance of an agreement with Daniel to reconvey the farm, and was intended as a reconveyance. The defendants deny that any such agreement was made, or that Daniel ever intended to reconvey the farm; but they allege, that at the time of the date of the release, Daniel was deranged, in consequence of the pain arising from his broken limb, and that they are informed and believe, that during such derangement, the complainant fraudulently procured the possession of the deed, and procured from Daniel his signature to the release, and to the assignment of the bond of Pontus Howland. Fanny Howland, the mother is dead; and Peter Fish, the other subscribing witness to the assignment and release, is the complainant in this cause. On the 22d of November, 1819, Samuel Howland made his will, and charged his debts upon his real estate; gave a legacy of \$340 to Jonathan Howland, charged upon his real estate, and payable in one year after the testator's death, and devised the residue of his estate to his grandsons, the defendants Pontus and Samuel Howland, and appointed the complainant his executor, with power to sell and divide his estate agreeably to the will. The testator had no personal estate, and claimed no real estate, except the farm before mentioned, and died indebted to the complainant in a large sum for board, &c. On the 16th of April, 1825, after the death of Samuel Howland, the defendant Haight purchased of Pontus Howland the one fourth of

1828. <hr style="width: 100px; margin: 0;"/> Fish v. Howland.	the farm which had been conveyed to him by Daniel Howland in 1816, for \$930; and before the conveyance was executed, or any part of the purchase-money paid, Haight had notice from the complainant of the claims upon the premises set up in the bill in this cause. In May, 1825, Daniel Howland conveyed his one fourth of the farm to the defendant, Solomon Howland, his brother, who is an infant, for the sum of \$5. The complainant seeks to charge both of these shares with the payment of the debt of Samuel *Howland, for maintenance, &c., and with the legacy to Jonathan Howland, on the ground that they are an equitable lien on the estate as originally conveyed to Daniel Howland; and he also insists, that the alleged agreement of the 16th of November, 1819, should be carried into effect, by decreeing the release of that date a valid reconveyance of so much of the premises as then belonged to Daniel Howland. The case was submitted on the pleadings and proofs, and on written arguments.
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Fish, for complainant.

Swift, for defendants.

THE CHANCELLOR:—So far as the bill seeks to charge the lands conveyed to Daniel Howland, or any of the defendants personally, with the legacy of \$340 to Jonathan Howland, and charged by the testator on his real estate, it would seem that the legatee was a necessary party. In *Morse v. Sadler*, (1 Cox's Cases, 352,) the Master of the Rolls decided, that every legatee, whose legacy was charged upon the real estate, must be a party to the bill. It is true, that case was overruled by Chancellor Kent, in *Brown v. Rickets*, (3 Johns. Ch. Rep. 553,) where it was held, that one legatee might file a bill in favor of himself and all others who might choose to come in under the decree. But even there, Chancellor Kent considers it necessary that the bill should state the fact that it is filed in behalf of the complainant and all

others, &c. The reason of the rule seems to be, that the defendants may not be charged with a double defence. The creditor or legatee sues for his own debt or legacy, and claims nothing in behalf of others standing in the same situation, unless they choose to come in and make their claim; in which case they will be bound by the decree. They have a right to come in and make their claim in the first suit; and if they neglect to do it, the court will not subject the defendants to the expense of re-litigating the whole subject again in another action. In this case, the complainant has no interest whatever in this legacy, or any other. It is, therefore, the ordinary case of a trustee prosecuting a claim for the benefit *of the *cestui que trust*, in which the latter should be a party. (*Kirk v. Clark, et al.*, Prec. Ch. 275; 2 Eq. Ca. Abr. 165, S. C.) For aught that appears in this case, Jonathan Howland may not wish to charge the defendants, or the estate, with the payment of the legacy of \$340.

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The release of the 16th of November, 1819, indorsed on the deed, can by no possible construction, operate as a reconveyance of the farm, or any part thereof, to Samuel Howland. And although I am not satisfied from the testimony, that Daniel was actually deranged at that time, so as to render his acts void on that account, it is very probable he was so far intoxicated, that he does not recollect what did take place. There is not, however, that certain and satisfactory evidence of what agreement, if any, was made on that occasion, which would warrant this court in decreeing a specific performance, or in correcting the terms of the papers then executed.

The right of the vendor to an equitable lien on the estate sold, for the payment of the purchase-money, has frequently been drawn in question both in England and in the courts of this country. In England, and I believe in every state of the Union which has a court of chancery to give effect to such a lien, it is admitted to exist. But what is to be construed a waiver or abandonment of the implicated lien, is a

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question which is not well settled; and the cases on this point are not easily reconciled with each other. It may therefore be necessary for me to examine this question somewhat at length.

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The earliest case which I have been able to find, in relation to this implied lien, is *Chapman v. Tanner*, before Lord Guilford, in 1684, (1 Vern. Rep. 267.) By the report of that case, in Vernon, it appears the vendee had become bankrupt, and the question was, whether the vendor had a preference to be paid the purchase-money out of the proceeds of the lands, or must come in as a general creditor under the statute. And the lord keeper decided that there was a natural equity that the land should stand charged with the unpaid purchase-money, without any special agreement for that purpose. But, by a reference to the register's book, it appears *there was a special agreement in that case, that the seller should retain the title deeds until the purchase-money was paid. (Ambler's Rep. 726; 1 Bro. Ch. Rep. 424, note b.) The next case, *Bond v. Kent*, (2 Vern. 281,) was decided a few years afterwards, while the great seal was in commission, after Chancellor Jeffries was killed by the populace. In that case the vendor took back a mortgage on the land for part of the purchase-money, and took the vendee's note for the residue. And it was decided that there was no lien upon the land, as to that part of the purchase-money not included in the mortgage. Then followed the case of *Coppin v. Coppin*, (2 Peere Wms. 291,) where Lord King decided in favor of the vendor's lien, notwithstanding a receipt for the purchase-money was indorsed on the conveyance of the estate. In *Pollexfen v. Moore*, (3 Atk. 272,) Lord Hardwicke charged the estate, in the hands of an heir at law, with the unpaid purchase-money due to the vendor. But in that case, too, as appears by the note of Mr. Sanders, the vendor retained the conveyances of the estate as security for the payment. Then followed the dictum of Sir Thomas Clark, Master of the Rolls, in *Burgess v. Wheat*, (1 Eden's Rep. 211,) where he expressly recog-

nizes the general principle of the vendor's equitable lien. The next case was *Tardiff and wife v. Scrugan*, which was never reported, but which is cited and referred to by Sir James Mansfield and Lord Rosslyn, in *Blackburn v. Gregson*, (1 Bro. Ch. Rep. 423.) In that case, the vendor conveyed the estate to his two daughters, in consideration of an annuity of 20*l.*, and took their joint bond to secure the payment of the same. One of the sisters married and died, and her husband, being entitled to a life estate in a moiety of the premises, refused to pay any part of the annuity. On a bill filed by the other sister and her husband, Lord Camden decided that a moiety of the annuity was a lien upon the estate, in the hands of the defendant; and directed that he should pay a moiety of the arrears, and keep down a moiety of the growing payments of the annuity. In *Farwell v. Heelis*, (Amb. Rep. 734,) Lord Bathurst declared, that taking the bond of the vendee for the purchase-money, payable at a future day, 'was a discharge of the equitable lien. *This is the last English case prior to the revolution, but has been frequently overruled since; and it cannot be reconciled with the case of *Tardiff v. Scrugan*, which immediately preceded it. In *Blackburn v. Gregson*, (1 Bro. Ch. Rep. 420,) the vendor took the bond of the purchaser, payable by instalments, and afterwards became a bankrupt. On a bill filed by the assignees of the vendor, it was attempted to charge the land, in the hands of the assignees of the vendee, who was also a bankrupt, with the unpaid purchase-money, on the ground of equitable lien. This question was argued at great length before the lords commissioners; and Lord Rosslyn expressed a very decided opinion in favor of the lien; but the cause finally stood over on this point. It was afterwards re-argued, on the same point, before Lord Thurlow, (see 1 Cox. Ch. Rep. 90.) who avoided a decision of this question. The cause was finally disposed of on other points; and the question of lien was never decided. With the exception of the dicta in *Walker v. Preswick* and *Harrison v. Southcote*, (2 Ves. sen.

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898 and 622,) there is no other reported case on the subject, until the case of *Austin v. Halsey*, (6 Ves. jun. 475.) There a legatee claimed to be substituted in the place of the vendor, in regard to the equitable lien; and Lord Eldon says, "I consider it clearly settled, that the vendor has a lien for the purchase-money, while the estate is in the hands of the vendee. I except the case where, upon the contract, evidently that lien, by implication, was not intended to be reserved." [1] A few months afterward, the case of *Nairn v. Rouse*, (6 Ves. 752,) came before Sir William Grant, Master of the Rolls, who declined entering into the general question whether every security taken for the purchase-

[1] *Stafford v. Van Rensselaer*, 9 Cow. 316; *Bradley v. Bosley*, 1 Barb. Ch. 125; *Warner v. Van Alstyne*, 3 Paige, 513; *Bailey v. Greenleaf*, 7 Wheat, 46; *Watson v. Wells*, 5 Conn. 468; *Jackman v. Hallock*, 1 Hammond, 318; *Tierman v. Beam*, 2 id. 383; *Patterson v. Johnson*, 7 id. 226; *Evans v. Goodall*, 1 Blackford, 246.

In Connecticut, the doctrine of an equitable lien for the purchase-money has been somewhat modified. See *Meigs v. Dimock*, 6 Conn. 458. Church, J., in *Atwood v. Vincent*, 580, *et seq.* In Pennsylvania, it does not exist after the vendor has conveyed the legal title, as against a subsequent judgment creditor: *Kauffelt v. Bower*, 7 Sergt. & R. 64; *Semple v. Burd*, id. 286; *Megargel v. Saul*, 3 Whart. 19: and has been exploded in North Carolina. *Womble v. Battle*, 4 Ired. Eq. Ca. 182. The Supreme Court of the United States held, that it cannot be asserted against creditors, holding under a *bona fide* conveyance from the vendee, nor a subsequent *bona fide* purchaser without notice: *Bailey v. Greenleaf*, 6 Wheat, 46; 5 Cond. 229. This decision is condemned in *Sweloes v. Williams*, 3 Whart. 493; and in New York dissented from, unless the conveyance or mortgage to the creditor be founded on some new consideration, without notice of the lien. See *Shirley v. Sugar Refinery*, 2 Edwards, 505. But if the vendor takes security from a third person, he loses his lien. *Vail v. Foster*, 4 Comst. 312; either in whole or in part; *Shirley v. Sugar Refinery*, *supra*. But the mere taking of a promissory note from the vendee, subsequent to the conveyance, will not act as a waiver; and it rests on the purchaser to prove that it was intended to operate as such. Id. Chancellor Kent favors the decision of the Supreme Court in *Bailey v. Greenleaf*, 7 Wheat. 46; see 4 Kent, 154, n. f.

This doctrine in regard to vendors' liens seems to be derived from the Roman law, which passed the property unconditionally to the purchaser, if the seller took another pledge, or other security: *Venditæ vero res et traditæ non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit, veluti ex promissore aut pignore dato.* Just. 2, 1, 41.

money, necessarily amounted to a waiver of the lien of the vendor. He declared it to be then settled, that equity gives the vendor a lien for the purchase-money, without any special agreement to that effect. But if the vendor does not trust to that, and carves out a security for himself, he says it remains a matter of doubt, whether that does or does not amount to a waiver of the equitable lien. In *Elliott v. Edwards*, which came before the Court of Common Pleas the same year, (3 Bos. & Pul. 181,) a third person had become security for the *purchase-money on the sale of a leasehold estate, but the assignment of the lease contained an express covenant that the purchaser should not under-let, assign, or transfer the premises without leave of the vendor, until the purchase-money was paid. The court decided this was an equitable incumbrance on the estate, which might be enforced against a purchaser with notice. In the case of *Hughes v. Kearney*, (1 Scho. & Lef. Rep. 132,) which came before Lord Redesdale in the following year, the vendee gave his note for the unpaid purchase-money, which was put into the hands of a third person, as trustee, until the incumbrances on the estate could be ascertained, and paid off out of the same, and then the residue to be paid to the vendor. It was held, that the balance of the purchase-money, included in the note, was a lien upon the lands, in the hands of the heir of the purchaser.

In *Mackreth v. Symmons*, (15 Ves. 329,) a bond had been given for the payment of the purchase-money, in the manner therein stated; and it was held, that the equitable lien on the land existed as against a purchaser with notice. Lord Eldon there refers to most of the previous decisions and dicta in relation to the general principle, which he considers well settled. But he renders the question, as to what shall be deemed a discharge of the lien, if possible, still more obscure. He even intimates, in opposition to the opinion of Sir William Grant, in *Nairn v. Rouse*, and taking a mortgage upon another estate, as security for the purchase money, might not be considered a waiver of the

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equitable lien on the premises sold. And in *Grant v. Mills*, (2 Ves. & Bea. 306,) the Master of the Rolls decided, that where the vendee drew bills on himself and his partner, obtained an acceptance thereof payable at a future day, and delivered them to the vendor for the purchase-money, the equitable lien was not discharged. He considered the bills only as a mode of payment, and not a security. I certainly should have come to a different conclusion, from the facts as stated in the report of that case. And the reasoning of the Master of the Rolls, upon the nature of the bills of exchange, would have been more appropriately applied to the case of a simple draft given in payment, where the additional security of the previous acceptance of a third person had not been required or agreed upon.

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*In *Ex parte Peake*, (1 Mad. R. 346,) Sir Thomas Plumer decided, that the vendor's receiving bills of exchange in payment of the purchase-money, did not discharge his lien upon the land. And in *Ex parte Loaring*, (2 Rose's Ca. in Bank. 79,) where the vendor had taken a negotiable note from the purchaser at four months, and had it discounted, but which was returned to him on the vendee's becoming a bankrupt, it was held, that the equitable lien on the estate was not waived; Lord Eldon at the same time expressing his wish that this species of lien had never been admitted, where the vendor had accepted a different security. In the case of *Saunders v. Leslie*, (2 Ball & Beatty, 514,) before Lord Mannors, in Ireland, about the same time, it was decided, that the acceptance by the vendor of the bond or note of the purchaser, payable at a future day, was no waiver of the lien. And a still more recent case is referred to in a note of *Simmons & Stuart*, where it was admitted, that the giving of the bond of the vendee did not discharge the lien, although, from the nature of the covenants in the bond given in that case, and the special circumstances then stated, it was decided the lien was gone. (*Ex parte Parks*, 1 Glynn & Jameson's Rep. 228.) And in *Winter v. Lord Anson*, (1 Simons & Stuart's Rep. 434,) which is the last

English case to be found in any reports which have yet reached this country, Sir John Leach appears to be again travelling back to the decision of Earl Bathurst, in *Farwell v. Heelis*, which has been so often overruled. In this recent case before the Vice-Chancellor, the vendee gave his bond for the purchase-money, payable at the death of the vendor, and the interest thereof to be paid annually. A receipt for the purchase-money was indorsed upon the conveyance. It had been referred to a master to inquire if it was agreed between the parties that the bond should be accepted in payment, and that the vendor should have no lien upon the land. The master reported that it was not so agreed. But notwithstanding this, the Vice-Chancellor decided it was evident that the intention of the vendor was to part with the estate immediately, and to wait for the purchase-money till a future day, and consequently, that there was no lien for it on the land.

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*It appears, from this review of the English cases, that the question, as to what shall be considered a waiver of the implied lien on the lands conveyed, for the unpaid purchase-money, is still unsettled in that country. But I am gratified to find, that in the American cases, so far as I have been able to discover, with one exception, there is a uniform current of authority in favor of what I consider, at this day, as the only correct rule on this subject; a rule which will enable vendors and purchasers to understand their respective rights, without the necessity of resorting to a court of chancery, to give a construction to the varying circumstances of each particular case.

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The American case which I consider an exception to the uniform current of decision in this country, is *The Representatives of Wragg v. The Comptroller General*, in the chancery court of South Carolina, (2 Dessaus. Rep. 509,) and is founded upon the decision of Earl Bathurst, in *Farwell v. Heelis*, that the acceptance of the bond of the purchaser, payable at a future day, is a discharge of the equitable lien upon the land conveyed.

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The general rule as to the vendor's lien on the land, is recognized in the courts of Kentucky. But in *Francis v. Halerigg's ex'r.*, (Harden's Rep. 48,) where the vendor gave an absolute conveyance and took a bond for the purchase-money, in which a third person joined as security, the court decided there was no lien upon the land. In another case, (*Cox v. Fenwick*, 3 Bibb's Rep. 183,) Judge Owsly acknowledges the general rule, but adds, "The rule, however, is liable to various exceptions, as where the vendor takes a distinct and independent security for the purchase-money, or where, from other circumstances, it is clearly inferable that the vendor does not rely upon the lien on the land."

The same principle has been recognized in the court of appeals in Virginia. In *Cole v. Scott*, (2 Wash. Rep. 141,) it was decided, that no security having been taken for the purchase-money, the vendor had a lien upon the land. But Pendleton, president, observes, "If he hath taken a security, or the vendee hath sold to a third person, without notice, the lien is lost." And in a subsequent case, where the vendor* had conveyed the land and taken a bond for the purchase-money, in which a third person joined as security, it was decided the lien was lost. (*Wilson v. Graham's ex'r.*, 2 Munf. Rep. 297.)

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In *Gilman v. Brown*, (1 Mason's Rep. 214,) Judge Story held, that taking the notes of the vendee for the purchase-money, indorsed by a third person as his security, was a waiver of the lien; and his decision in that case was afterwards affirmed in the Supreme Court of the United States. (4 Wheat. 290.) In the case of *Gurson v. Green*, in this court, (1 John. Ch. R. 308,) Chancellor Kent recognizes the general doctrine of equitable liens for the purchase-money, and decides that taking the vendee's note does not discharge the lien. But he does not attempt to lay down any general rule as to what will and what will not operate as a discharge.

Lord Eldon seems to think that the question of lien or no lien depends altogether upon the intention of the parties,

and that each case must be determined upon that principle, and upon its own particular circumstances. If the actual intention of the parties was to govern the decision of the court, the lien would seldom be sustained; for it is probable that not one person in a hundred, who conveys or purchases real estate, is aware of the existence of such a principle of equity. A much safer rule, I apprehend, is, to sustain the implied lien whenever the vendor has taken the mere personal security of the purchaser only, and to consider any bond, note or covenant given by the vendee alone, as intended only to countervail the receipt of the purchase-money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien; and on the other hand, to consider the lien as waived, whenever any security is taken on the land, or otherwise, for the whole or any part of the purchase-money, unless there is an express agreement that the equitable lien on the land shall be retained. This constitutes a safe rule, easily understood, and which I consider established by a weight of authority in this country which is not easily shaken. And I believe no English case, previous to the revolution, will be found in opposition to these *principles, except the case of *Farwell v. Heelis*, which is overruled by Chancellor Kent, in *Green v. Garson*.

Applying this rule to the case now under consideration, the lien which is claimed in this case, upon the land conveyed by Samuel Howland, cannot be sustained. The deed to Daniel Howland purports to be made in consideration of natural love and affection, and divers other good considerations. The object of the grantor was to dispose of his property after his death, and secure a legacy to his son; and, in the meantime, to retain the control of the property, so far as to secure to himself a maintenance out of the rents and profits thereof during his life. He did not rely on any implied lien upon the farm for this purpose, but carved out his own security for his support, by a direct incumbrance

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upon the estate conveyed. For this purpose, he took back a life lease of the premises at a nominal rent; and the use of the farm, probably, was then considered an ample provision for his support. The recital in the bond shows that this life lease was the only security for the support of the vendor which was contemplated between the parties. Even the bond itself contained no covenant that Daniel should support the old gentleman. The condition merely recited the understanding of the parties, that Daniel was to have the use of the farm free of rent, so long as he did actually maintain and support his grand-father; and whenever he neglected to provide such support, the vendor had a perfect right to resume the possession of the farm, or to exact rent for the use and occupation thereof. This case, therefore, comes within the principle adopted in *Bond v. Kent*, (2 Vernon, 284,) *expressum facit cessare tacitum*; that where, by the agreement of the parties, there is an express lien upon the estate, for a part of the consideration of the conveyance, it excludes the idea of an implied lien for the residue. The same principle is also recognized by Chief Justice Marshall, in the case of *Brown v. Gilman*, already referred to.

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The bill, as against the defendants, Solomon Howland and Robert Haight, must therefore be dismissed with costs. The complainant, as executor of his father-in-law, has a valid claim against the other defendants, for the use and occupation *of the premises after Daniel ceased to support the old gentleman, until the termination of the life lease; and that claim being now fairly before this court, I shall retain the bill against them for the purpose of an account and satisfaction of the rents and profits of the premises during that time.

The declarations of Samuel Howland, as to the abuse and bad conduct of Daniel, are certainly not legal evidence on which to found a claim in behalf of his personal representative. But the habitual intemperance of Daniel, and the consequences which must necessarily follow therefrom,

together with other circumstances in the case, which are established independent of the declarations of the old gentleman, rendered it improper for Daniel Howland to have the care and support of his grand-father, at his advanced age. Daniel having, by his misconduct, forfeited all claim to retain the possession of the farm for the support of his grand-father, had no right to retain it, by transferring him to Pontus or any other person to be supported. The old gentleman had a perfect right to provide for his own support wherever he thought proper, which right he has exercised; and Daniel and Pontus were bound to deliver up to him the possession of the farm during the continuance of the life estate therein; but having neglected to do so, they are accountable to his personal representative for the rents and profits thereof. And there must be a reference to a master, to take such account from the 16th of November, 1819, to the death of Samuel Howland. And the question of costs, as between the complainant and Daniel and Pontus Howland, and all further directions, are reserved.

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Where a testator devised certain real estate to his widow for life, or during her widowhood, and after her death or marriage, devised the same to his nephew in fee, provided he paid the legacies mentioned in the will, and directed that the legacies should be paid by the nephew, his heirs, executors, or administrators, whenever he or they should come into possession of the premises devised, it was held, that a payment of the legacies was a condition of the devise; and that if the devisee or his heirs should refuse to *accept the devise and pay the legacies, the estate would descend to the heirs at law of the testator; but it would, in equity, be chargeable with the payment of the legacies.

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If the devisee accepts the devise, he becomes personally liable for the legacies.

The legacies, however, are, notwithstanding the personal liability of the devisee, an equitable charge upon the estate.

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 v.
 Hewlett.

It is a general rule, that legacies chargeable upon the real estate and payable at a future day, are not vested, and lapse by the death of the legatees before the time of payment arrives.

But this rule has never been extended to a case where the estate was given to a stranger, upon condition that he paid the legacy charged thereon; and the rule has been much limited, even as between the legatees and heirs at law.

Where the time of payment of the legacy is postponed for the benefit of the estate, and not with reference to any particular circumstances in relation to the legatee, the legacy becomes vested at the death of the testator, and is transmissible to the personal representatives of the legatee, although he dies before the time of payment arrives.

Where the devisee of the real estate, charged with the payment of the legacy, refuses to pay the same, the costs of the legatee's suit to recover the legacy, will be a charge upon the real estate. A legacy carries interest from the time it becomes payable.

May 19th.

JAMES HEWLETT, the elder, who died in 1805, devised certain real estate to his widow for life, or during her widowhood; and after her death or marriage, he gave the same to his nephew, James Hewlett, in fee, provided he paid the legacies mentioned in the will. He then gave divers legacies to his relatives, and among others, 100*l.* to John Birdsall; and he directed these several legacies to be paid by the nephew, his heirs, executors, or administrators, whenever he or they should come into possession of the premises devised. James Hewlett, the devisee, and John Birdsall, both died in the life time of the widow, but after the former, by some arrangement with her, had entered into the estate devised, and sold and conveyed a part thereof of fee. The widow died unmarried in 1825. And the defendants, who are heirs at law of James Hewlett, the nephew, and in possession of part of the real estate devised to him, refuse to pay the legacy to the complainant, as the personal representative of John Birdsall.

The cause was submitted upon bill and answer, and the written arguments of counsel, as against L. S. Hewlett, and on the bill taken *pro confesso*, against the other defendants.

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* *McCoun*, for complainants.

W. Tallmadge, for defendant, L. S. Hewlett.

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THE CHANCELLOR:—The payment of the legacies is a condition of the devise; and if the devisee, or his heirs, refuse to accept the devise and pay the legacies, the estate descends to the heirs at law of the devisor, but, in equity, chargeable with the payment. In this case, the devisee having accepted the devise, was personally liable for the legacies; but they are also an equitable charge upon the estate devised, in the hands of the defendants.[1]

It is undoubtedly a general rule, that legacies charged upon the real estate, and payable at a future day, are not vested, and become lapsed if the legatee dies before the time of payment arrives.[2] This rule was at first adopted without any exceptions, and in direct opposition to that which existed in relation to legacies payable out of the personal estate. This was done for the benefit of the heir at law, who was a particular favorite of the English courts. I am not aware that it has ever been extended to a case where the estate was given to a stranger, upon the express condition that he paid the legacy charged thereon; and the rule has long since been much narrowed down, even as between the legatees and the heir at law.

In this case, the estate being given upon the express condition of the payment of the legacy, and the time of payment being postponed for the benefit of the estate, and not with reference to any particular circumstances in relation to the legatee, which might render it doubtful whether the legacy would ever be wanted, the legacy became vested at the same time that the estate in remainder became vested in the devisee: that is, at the death of the testator.[3] It

[1] *Glen v. Fisher*, 6 John. Ch. 33.

[2] This rule has been changed by statute in New York, in 1830. See 2 R. S. (4th ed.) 248, sec. 45; *Bishop v. Bishop*, 4 Hill, 138, as in most of the other states.

[3] *Marsh v. Wheeler*, 2 Edward's Ch. 156, 163; *Harris v. Fly*, 7 Paige 421; *Kübler v. Whiteman*, 2 Har. 401; *Donner's Appeal*, 2 Wats. & S. 327.

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was transmissible to the personal representatives of the legatee; and the complainant is entitled to a decree for the payment out of the estate.

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The defendants having neglected and refused to pay the legacy, by which the complainant has been put to the expense of this litigation, the costs of the suit must also be *charged upon the estate. The legatees are also entitled to interest from the time when the legacies became payable, by the death of the widow. (*Glen v. Fisher*, 6 John. Ch. Rep. 33.)

DALE AND OTHERS, EXECUTORS OF FULTON v. ROSEVELT.

An injunction is not waived by a delay in applying for an attachment for its violation.

Where executors obtained a decree for a perpetual injunction, restraining R. from suing or prosecuting any action at law against such executors or other representatives of their testator, for the recovery of the arrears of an annuity; held, that the prosecution of a suit at law against the heirs of the testator, who were not parties to the suit in this court, to recover the same annuity, was not a breach of the injunction. There is no privity between an executor and the heir or devisee of the land.

A record cannot be read as evidence in a suit, unless both parties, or those under whom they claim, were parties to the suit in which the record was filed.

A decree in a suit in which executors are parties, is not binding upon the heirs of their testator, unless such heirs are also parties to the suit.

May 20th.

THE defendant in this suit brought an action in a court of law to recover the arrears of an annuity against the complainants as executors of Robert Fulton. The complainants filed their bill in this court, and obtained a decree for a perpetual injunction, restraining Rosevelt from suing or prosecuting any action or suit at law against the complainants or other representatives of Fulton, for the recovery of the annuity. (See the case reported in 5 John. Ch. R. 174

and 255, and in 2 Cowen's Rep. 129.) After the determination of this suit, Roosevelt brought a suit in the Supreme Court against the heirs at law of Fulton, who were not parties to the suit in this court, to recover the same annuity. That suit has been pending two or three years, and two trials have been had therein. Dale, the surviving complainant in this suit, now makes an application in his own name for an attachment against Roosevelt and his attorney, for an alleged breach of the injunction in this suit, by the proceeding at law against the heirs.

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*THE CHANCELLOR:—There is nothing in the objection, that the injunction has been waived by the neglect to apply sooner to this court, because the counsel for the heirs in the suit at law have constantly protested against the proceedings there; and it does not lie with Roosevelt to complain that he has not sooner been punished for violating the injunction, if a contempt has in fact been committed.

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The objection that Dale has no interest in this question, and therefore has no right to complain of the breach of the injunction, would probably be a valid one if the heirs were adults; and even in the case of infants, it would have been more regular if the application appeared in the notice to be made in their behalf, as their guardian or next friend. If they are entitled to the benefit of the decree, they have a right to apply directly to the court for protection; and this court will not be very rigid in insisting upon that which is mere form, where the application is in fact for the protection of the rights of infants, but will look into the real merits of the application.

The more important question here is, whether the prosecution of the suit at law against the heirs was a breach of the injunction. In the case of *Mason's devisees v. Peter's administrators*, (1 Mun. Rep. 446,) it was held by Judge Tucker, that there was no privity between an executor and the heir or devisee of the land. The same principle is recognized in the Supreme Court of this state, in *Osgood v.*

1828. *The Manhattan Company*, (3 Cowen's Rep. 622.)[1] A record in one suit cannot be read as evidence in another, unless both parties, or those under whom they claim, were parties to both suits; it being a rule, that a record cannot be used against a party who could not avail himself of it, in case it made in his favor. (1 Munford, 394, and 1 Hen. and Mun. 165, per Roane, J.) In *Payne v. Coles*, Judge Roane says, it is a rule of evidence, that no person can take the benefit of the proceedings in any suit, or any verdict, who could not have been prejudiced thereby, if it had gone against him. (1 Mun. 394.)

[*37] The decree in this suit was not binding upon the heirs of Fulton, they not being parties to the suit; and it cannot be *binding upon Roosevelt as between him and them. That the decree could not be binding upon the heirs, was decided by Chancellor Kent on the rehearing in this case. (5 Johns. Ch. Rep. 257.) The heirs are not permitted to take advantage of the perpetual injunction which was granted at the suit of the personal representatives; and the prosecution of the suit at law against the heirs was not a breach of the injunction.

Motion for attachment refused.

VERMILYEA *v.* THE FULTON BANK, LEVITT AND OTHERS.
THORP AND OTHERS *v.* SELDEN AND OTHERS.

The officers of a corporation may be made parties to a bill of discovery, to enable the complainants to obtain a knowledge of facts which could not be arrived at by the answer of the corporation put in without oath.

The corporation ought also to be permitted to put in a separate answer, in order to make offers and admissions, and to deny facts which the officers may suppose do exist.

Upon the answer of the officers or agents of the corporation, no decree for relief can be founded either as against them or the corporation.

[1] 2 Cowen & Hill's notes to Phil. Ev. 7.

After putting in their answer, they may be sworn as witnesses on the part of the complainant, and the corporation will have the benefit of their cross-examination.

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v.
Fulton Bank.

SELDEN, for complainant, moved that separate answers of the bank and Leavitt be taken off the files of this court, and that they file a joint answer.

Hoyt and Tolcott, (attorney-general,) contra.

Like motion. *R. Emmett*, for motion.

Hoyt and Attorney-General, contra.

THE CHANCELLOR:—It is now well settled, that officers of a corporation may be made parties to a bill of discovery, for the purpose of enabling the complainant to obtain a knowledge of facts which could not be ascertained by the answer of the corporation, put in under their corporate seal, and without oath. But what is to be the effect of that answer of *the agent or servant of the corporation, is a question that does not seem to have received any formal adjudication in this court. If it is to be binding and conclusive upon the corporation, I can see no necessity for making the agent a party to the bill. The better course would be for the plaintiff to state in his bill those facts and circumstances which require an answer from the corporation out of the usual form, and apply to the court for an order that some or all the officers or agents of the corporation swear to their belief of the truth of the matters contained in the answer. This course was decided by the late Chancellor Kent to be inconsistent with the law of this court, and such an application was refused. (*Brumley v. Westchester Manuf. Society*, 1 John. Ch. Rep. 366.) If the object of making the agent a party is for discovery, to enable the plaintiff to understand his rights and to direct his inquiries, either by amending his bill or in the subsequent examination of witnesses in the cause, there is a manifest propriety in letting

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the corporation answer in the usual way, and compelling the agent to make the discovery of any facts within his knowledge by his separate answer. The corporation may wish to make admissions, offers or concessions, with which the party joined for discovery merely has nothing to do. And, on the other hand, they may wish to disprove facts which the agent actually supposes to exist; which they cannot do, if they are compelled to incorporate his statements in their answer. In *Wych v. Meal*, (3 Peere Wms. Rep. 312,) Lord Talbot says, "Notwithstanding the answer of the officer cannot be read against the company, yet it may be of use to direct the plaintiff how to draw and put his interrogatories, towards obtaining a better discovery." And in a subsequent case, in which it was sought to make the wife a party for the purpose of discovery, Lord Eldon, in comparing that case with the case of an agent of a corporation, says, "In the case of the agent, there is the answer of a party who may be converted into a witness; but in the case of the wife, her answer cannot lead to her examination as a witness. Her case, therefore, cannot be compared to that of an agent of a corporation." (15 Ves. Rep. 165.)

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*From these dicta it appears, that as against the agent of the corporation, it is a bill of discovery merely, and that no decree for relief can be founded on his answer, either as against him or the corporation. The plaintiff may afterwards use him as a witness, and the corporation will have the benefit of a cross-examination, or may disprove the matters contained in his answer. The motion must, therefore, be denied.

ISNARD v. CAZEAUX.

Notice of every application to the court must be given to the opposite party, in case he has appeared, where the motion relates to any matter pending in court, or where a final order is sought, orders for time, and those of a

like nature alone excepted; otherwise the applicant or petitioner will only be entitled to an order *nisi*.

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And copies of every petition, affidavit, &c., upon which the motion is founded, must be served, together with the notice of the motion.

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v.
Caseaux.

Where an order had been obtained on an *ex parte* application, that the complainant be admitted to prosecute in *forma pauperis*, the same was vacated with costs.

A party must be an object of charity, otherwise the privilege of prosecuting in *forma pauperis*, will not be granted to him.

Applications for this privilege are not encouraged

C. GRAHAM, for the defendant, moved to set aside an order obtained in this cause, that the complainant be admitted to prosecute this suit in *forma pauperis*. By the affidavits, it appeared, that long after the defendant had put in his answer, the order was obtained on an *ex parte* application to the late Chancellor, without any notice to the defendant's solicitor. It also appeared that the complainant was living in genteel style, occupying a house at a rent of \$400 per annum; had considerable sums, from time to time, standing to his credit in the bank; and was a healthy man, capable of earning a living. May 31st.

A. Rapallo, for the complainant, cited Wyatt's Prac. Reg. 319, and Har. Ch. 379, to show the practice was regular.

*THE CHANCELLOR:—It does not distinctly appear from the authorities cited, what is the practice in the English Court of Chancery, as to giving notice of the application to prosecute in *forma pauperis*, after the defendant has appeared. It is stated in Harrison's Prac. 390, and Wyatt's Prac. Reg. 319, that on presenting the petition, if no cause appears against it, the order is directed to be entered agreeably to the prayer of the petition; which seems to imply that the adverse party may appear and oppose, or show cause against the application. But whatever may have been the English practice, this case must be determined by the rules and practice of this court. And on this sub-

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ject we are not left to conjecture. The 40th rule expressly provides, that a copy of every petition, affidavit, &c., relating to any matter pending in court, or on which a final order is sought, shall be served on the adverse party, with notice of presenting the same, and of the motion to be founded thereon; otherwise, the applicant or petitioner shall only be entitled to an order *nisi*. The settled practice of the court under this rule, after appearance, is to give to the opposite party notice of every application to the court, where he has any interest, to appear and show cause why the same should not be granted, orders for time and of a similar nature alone excepted. This is one of those cases where the defendant had a direct interest in the question to be determined, and was entitled to notice of the application, and to be heard in opposition thereto. Neither can this order be sustained upon the merits. Applications of this kind are not to be encouraged in this state, where every healthy and industrious citizen can earn sufficient to support himself, and also to enable him to pay the moderate fees of the officers of this court. Even in England, where the stamp duties and the fees of office are so burdensome to the suitor, a party was dispaupered because it appeared he was in possession of the premises in controversy, a cottage worth only 40s. per annum. (*Spencer v. Bryant*, 11 Ves. 49.) In this country, the court must be convinced that the party is really an object of charity before it will grant him this privilege. At the time this order was granted, the complainant had considerable sums of *money under his control in the bank; occupied a house at \$400 rent, and kept a servant, &c. He was living in a style which a majority of the solicitors and counsellors of this court could ill afford, and at an expense which the compensation allowed to most of the judicial officers of the state would not have enabled them to sustain. He was not an object of charity, and had no claims upon the officers of this court for their gratuitous services.

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The order allowing him to prosecute his suit as a pauper must be vacated; and he must pay the costs of this application.

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v.
Montgomery.

S. & W. SOUTHGATE v. MONTGOMERY & EIVERS.

Courts of law have concurrent jurisdiction with the Court of Chancery in the examination of accounts between parties.

Where a party has elected a court of law as the forum for the examination of the accounts, after a decision in such court of law, he cannot come into a court of equity and have the same accounts re-examined.

Where there existed mutual accounts between M. and E., and E. sued M. in a foreign court for a settlement, and judgment was rendered against E., and afterwards a suit pending in the Supreme Court of this state, commenced and prosecuted by the assignees of M. in the name of M. against E., was referred to referees, who reported a balance due to E. from M., on which report judgment was entered in favor of E., it was held, that the judgment against E. in the foreign court was not binding upon E. as between him and the assignees of M., and that if that judgment was binding upon E., as it was known to the assignees previous to the hearing before the referees, it should have been insisted upon by them at that hearing, and could not afterwards be a ground of relief in this court.

In Chancery, a judgment recovered in a court of law is considered as binding upon the real parties in the suit, although not the nominal parties on the record.

A court of chancery will judicially notice the fact, that courts of law recognize and protect the rights of assignees suing in the name of their assignor.

On the 16th May, 1810, the defendants were severally doing business in the West Indies, and the plaintiffs were merchants at Norfolk, in Virginia. The defendants had private dealings or accounts, and had also a quantity of lumber and provisions belonging to them jointly, which had been recently consigned to Hancock & McCormick, of St. Croix, to be *sold on their joint account. Montgomery had also in his hands a protested bill of exchange, drawn by Eivers in favor of McGregor or order, for 420*l.* 10*s.* 8*d.* sterling, which had in fact been sent to

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Montgomery to collect for the plaintiffs, but which Eivers, in his answer, swears he then, and for a long time afterwards, supposed belonged to Montgomery. At the time above mentioned, the defendants stated their accounts, and found a balance due to Montgomery of \$3,732 77, which Eivers promised to pay with interest; and by a memorandum indorsed on the account stated, Eivers appropriated his half of the net proceeds of the provisions and lumber in the hands of Hancock & McCormick, and in the hands of Montgomery, to the payment of that balance. He also, at the same time, took up the protested bill, and gave to Montgomery, therefor, an agreement as follows:

	£	s.	d.
" Bill for	420	10	8
Damages ten per cent.	42	01	0
Half per cent. protest, &c.	2	10	0
Interest, one per cent. per month,	50	00	3
	<hr/>		
	515	11	11

I promise to pay unto Robert Montgomery, or order, 515*l.* 11*s.* 11*d.* sterling, bearing protested bill interest from 31st January last, till paid, say 515*l.* 11*s.* 11*d.* sterling, being for value in my bill protested on Messrs. Robert Burke & Co. of Cork, liable to a special count. St. Croix, 16th May, 1810. (The above to be paid out of my one half proceeds of provisions and lumber addressed to Messrs. Hancock & McCormick, Bass End, after deducting your accounts.)

OWEN EIVERS."

On the 1st of July, 1811, Montgomery transmitted to the plaintiffs 200*l.*, together with the last mentioned agreement, on which he made two indorsements; the one acknowledging the receipt of the 200*l.* as the whole amount of the balance in his hands of the proceeds of provisions and lumber, and by the other, ordering the balance to be paid to the plaintiffs. They received the money and contract, and ratified the act of Montgomery in giving up

the protested bill and taking this contract in lieu thereof. In July, 1817, the plaintiffs sued Eivers in the name of Montgomery, in the Supreme *Court of this state, to recover the balance due to them on the agreement; the result of which suit appears by the report of that case. (*Montgomery v. Eivers*, 17 John. R. 38.) In October, 1810, they commenced another suit in the same court, in the name of Montgomery against Eivers. That suit was referred to referees, and finally heard before them in April, 1822, when they found and reported a balance due from Montgomery to Eivers of \$208 15, on which judgment has been subsequently entered in favor of Eivers in that court.

In May, 1822, the plaintiffs filed their bill in this cause, setting forth substantially the above facts, and alleging, among other things, that by the depositions taken in the last mentioned suit, and used before the referees, it appeared that in 1820, Eivers sued Montgomery in the town court of Frederickstadt, in the island of St. Croix, for the final settlement of all their accounts, and that a balance was then found due to Montgomery from Eivers of about 200 pieces of eight; that on the hearing before the referees, the counsel of Eivers produced an account in the handwriting of Montgomery, which the plaintiff's counsel were not apprised of until a short time before the hearing, when it was shown to them to obtain their admission of the genuineness of the handwriting, and they allege it must have had an influence on the minds of the referees. The plaintiffs allege that they do not know what was allowed on the one side or the other by the referees, and are unacquainted with the state of accounts between the defendants, and of course do not know which of the defendants ought to pay the balance due them for the protested bill of exchange; and they pray that the defendants may be compelled to discover which of them is liable to pay the same, and that payment may be decreed against the one who ought to pay. Eivers, in his answer, insists there is a balance due to him from Montgomery more than sufficient to satisfy the balance due the plaintiffs, and

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1828. which accrued long before he had any knowledge of their
 Southgate interest in the contract of the 16th May, 1810. He admits
 v. his counsel produced the account before the referees, as
 Montgomery. stated in the bill, but denies it was fraudulently or unfairly
 done, or was intended as a surprise upon the plaintiff's
 [*44] counsel. On the contrary, he says *it was shown to such
 counsel, and a copy thereof given to them the day previous
 to the hearing. He insists that the claim of the plaintiffs
 in *res adjudicata* as between him and them, and alleges that
 the balance found against him in the town court of Frederickstadt, of which he has heard, was unjust, and was caused
 by the sickness of his attorney at that place, which prevented him from properly attending to his rights before
 that court.

G. Griffin, for complainants :—The defendants severally deny their liability. The bill filed in this cause is like a bill of interpleader. The defendants have rendered it necessary by their own conduct. The remedy at law is doubtful and difficult. A party may first litigate to a final decision at law and then come into Chancery, upon the ground that the remedy at law is difficult. The complainants were not parties on the record to the suit at law. Not being so, there is no technical estoppel at law, and therefore no equitable estoppel here. Eivers is estopped by the judgment recovered in the West Indies. *Res adjudicata* abroad is of equal effect as at home. (*Gelston v. Hoyt*, 1 John. Ch. R. 543. *Griswold v. Pitcairn*, 1 Con. R. 85.) The only exception is, where the successful party sues here, and the decree is in a foreign admiralty court. (*King v. Baldwin*, 17 John. R. 384; *Duncan v. Lyon*, 3 John. Ch. R. 351; *Foster v. Wood*, 6 John. Ch. R. 87; *Bateman v. Willow*, 1 Sch. & Lef. 205; *Mitchell v. Harris*, 2 Ves. jun. 135; *Wilmot v. Leonard*, 2 Swans. R. 682; Colwell, 93; 3 Atk. 644.)

Ogden and E. Clark, for the defendant Eivers. The com-

plainants being parties to the suit in the Supreme Court are precluded from relief in this court. They adopted the act of Montgomery. (17 John. R. 38.) In the second suit, the complainants were necessarily bound to show the state of the account between Montgomery and Eivers. This is an application to review the decision of the Supreme Court. It is *res adjudicata* there. The only equitable ground stated in the bill, is the alleged surprise and fraud in the production of the account in the handwriting of Montgomery, before the referees; and this is denied by the answer, and not established by any *proof. In the trial in St. Croix, the complainants were not parties. In the suit in the Supreme Court here, they were the real parties, and were bound by it. (*Hawley v. Mancius*, 7 John. Ch. R. 174; *Shottenkirk and others v. Wheeler and others*, 8 John. Ch. R. 275; *De Reimer v. Cantillon*, 4 John. Ch. R. 85; *French v. Shotwell*, 6 John. Ch. R. 235.)

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THE CHANCELLOR:—If the expression, “after deducting your account in the agreement of the 16th May, 1810,” refers to an account of Hancock and McCormick, to whom the draft or agreement appears to be addressed, and not to the account of Montgomery, which was liquidated at the same time, the plaintiffs have nothing to do with the general accounts between the defendants; because Eivers’ half of the fund then in the hands of Hancock and McCormick, which Montgomery afterwards received, together with the 80 puncheons of meal, which he also received from them, as appears from the testimony of Hancock, stated in the plaintiffs’ bill, amounted to 6,634 pieces of eight 5 bits and 3 stivers, (equal to \$4,246 21;) a sum nearly double the amount due to the plaintiffs in the bill, independent of the sum of 3,954 pieces of eight and 5 bits, received by Montgomery for the provisions and lumber, sold by his agent Peter Montgomery, one half of which also belonged to Eivers. But if, as I am inclined to believe, the intention of the defendants was, that the amount due to

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Montgomery on their general accounts, was first to be paid out of the proceeds of the provisions and lumber, there would not be enough to pay both demands. There would still be a deficiency of 6 or 700 dollars, after including in Eivers' share of the fund one half of the amount received from Peter Montgomery. And Eivers having dealt with Montgomery in relation to the bill of exchange, without any knowledge of the plaintiff's claim, it would be necessary to go into the general accounts between the defendants, to ascertain which was equitably bound to pay the balance due to the complainants. This being a complicated account, the plaintiffs, in the first instance, would have been entitled to call Eivers into this court, for the purpose of having that account taken here. Whether they could bring both defendants here, and compel them to settle their accounts between themselves, on the principles of a bill of interpleader, which I am inclined to think they might under the particular circumstances of this case, is a question not necessary to be decided at this time. They also had a right to prosecute Eivers in a court of law, in the name of Montgomery; and the trial at law, under the decision of the Supreme Court in the first suit, necessarily required an examination of the accounts between Montgomery and Eivers. The court of law had concurrent jurisdiction with the Court of Chancery in examining that account. The plaintiffs elected their forum after the decision of the Supreme Court had apprized them of the necessity of going into these accounts: and having failed to establish their claim in a court of law, under such circumstances, the question now presented is, can they re-examine the same subject here as against the defendant Eivers?

The judgment against Eivers in favor of Montgomery, in the Island of St. Croix, in 1820, cannot be binding upon Eivers, as between him and the plaintiffs in this suit, for a variety of reasons. It was recovered about two years before the hearing before the referees, and was known to the plaintiffs at the time of such hearing, as it appeared in

the depositions used by them on that occasion. It was conclusive as to the state of the accounts, it should have been used and relied on by the plaintiffs for that purpose on that occasion; and they having neglected to insist upon it, they cannot now ask relief in this court on that account. (*Foster v. Wood*, 6 John. Ch. Rep. 87.) Again, the plaintiffs were not parties to the West India suit, and it was brought long after Eivers was apprized of their equitable interest in the contract respecting the protested bill. The decision of that cause could not, therefore, have been binding upon them; and of course cannot now be relied upon as *res adjudicata* in their favor. (*Paynes v. Coles*, 1 Mumf. Rep. 373; and per *Roane, J.*, 1 Hen. and Mumf. 165.) This question has been fully examined and decided in this court, in the case of *Dale v. Roosevelt*, but a few days since. I have examined the statements in the bill and the admissions in the answer of Eivers, and cannot discover any evidence that the decision of the referees in *the suit at law was not perfectly equitable. I cannot, in the absence of all proof, presume that the referees allowed the whole of the credit in the account put in by the attorney of Eivers, when they had before them the depositions of Hancock and Peter Montgomery, showing that it was a partnership transaction; and showing also the actual amount received by Montgomery on account thereof. Neither do I understand from the plaintiff's bill that they are certain that any injustice was done in that suit; but they wish the defendants now to litigate and settle their accounts between themselves, that the plaintiffs and the court may know whether injustice was done in the suit at law; and if it was not, that Montgomery may pay their debt. The allegation in the bill of fraud in the production of the account before the referees, is fully denied by the answer; and this court cannot now disturb the judgment on the report of the referees. Although the plaintiffs were not nominal parties in that suit, they state in their bill that they were the real parties. They prosecuted in the name of Montgomery, as

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assignees of the chose in action; and the decision must, therefore, in this court, be considered as binding upon them, as if they had been the nominal as well as the real parties on the record; for this court will judiciously notice the fact, that courts of law recognize and protect the rights of such assignees, suing in the name of the assignor.

The reasoning of Judge Radcliffe, in *Leguin v. Gouverneur and Kemble*, (1 John. Ca. 436,) is, to my mind, conclusive to show that the judgment of the Supreme Court, on the report of the referees, ought not to be disturbed by reason of anything that appears in this case. And the principles there laid down by him are expressly sanctioned by Ch. J. Spencer, in *Simson v. Hart*, in the Court of Errors. (14 John. Rep. 68.) This question was also fully and ably examined by the late Chancellor Kent, in the same case in this court. (1 John. Ch. Rep. 91.)

The plaintiff's bill, as against the defendant, Eivers, must be dismissed with costs. The other defendant having made default at the hearing, the plaintiffs may take such a decree against him as they can abide by.

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S. being indebted to the Manhattan Company, upon a note to the amount of \$2,000, and also being in embarrassed circumstances, upon the application of the directors of the company, in order to secure the amount due to the company, he assigned to them a bond and mortgage for \$4,000, which he held upon a house and lot in Poughkeepsie, against F. & H. The assignment was made with the express understanding that the surplus, after satisfying the debt of the company, should belong to S. The assignment stated that S., for the sum of \$2,000, assigned the bond and mortgage to the Manhattan Company, with power to collect the sum of \$2,000 for their own use, and contained a covenant on the part of S., that \$2,000 was due on the mortgage, and that the mortgaged premises should sel. for that sum and the interest and costs. In 1817, the Manhattan Company foreclosed the

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mortgage, and caused the mortgaged premises to be bid in for \$700. Previous to the sale, S. was told by the agent of the company, that if the company purchased in the property, it should remain as it then was as to him, S. merely foreclosing F. & H. S. always insisted upon his right to redeem, and in 1825 made a direct application for that purpose, and offered to pay all that was justly due the company. The company refused to permit him to redeem. It was held that the assignment from S. to the Manhattan Company was a mortgage, and even if it had been in form an absolute assignment of the whole interest of S. in the bond and mortgage against F. & H., that in equity it would have been a mere security for the payment of the debt due the Manhattan Company; that the Manhattan Company had a perfect right to foreclose the mortgage under the statute, for the purpose of barring the equity of redemption which existed in F. & H.; that the assignment by S. to the Manhattan Company was a mortgage of the power of sale, as well as a mortgage of the debt; that if a stranger had purchased the mortgaged premises upon the sale thereof, the right of S. to redeem the same would have been gone, but not his right to redeem the second mortgage created by the assignment, which right would then attach itself to the purchase-money instead of the land; that as the Manhattan Company were the purchasers of the mortgaged premises, the right of S. to redeem the said premises remained undisturbed, the legal estate of said premises continuing undivested in the Manhattan Company: that the assignment of the bond and mortgage to the Manhattan Company being itself a subsisting mortgage, and S.'s equity of redemption not being divested by the statute foreclosure, the question of waiver on account of lapse of time did not arise.

Twenty years are required to bar an equity of redemption.

Where a mortgagee obtains a renewal of a lease, or any other advantage in consequence of his situation as such mortgagee, the mortgagor coming to redeem, is entitled to the benefit thereof.

Where, under a statute foreclosure, the holder of the legal estate or mortgagee himself becomes the purchaser of the equity of redemption, no deed is necessary to make his title to the premises perfect.

*Parol evidence is admissible to show that a deed or conveyance, absolute on its face, was intended by the parties only as a mortgage or security for the payment of money.

Where a party files his bill to redeem, the general rule is, that he must pay costs to the mortgagee, although he should be successful.

There are, however, exceptions to this rule; as where the mortgagee sets up an unconscientious defence; in such case the mortgagee is not only refused costs, but must pay costs to the other party.

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ON the 4th of February, 1814, Slee, the appellant, sold May 26th. to Frear and Hallowell a house and lot in Poughkeepsie, for \$5,000, of which sum they paid down \$1,000, and gave

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him their bond and mortgage on the premises for \$4,000, and interest after the 1st of May, 1814, to be paid in four equal annual payments from the last mentioned day, and the interest on the whole sum to be paid annually. The mortgage contained the usual power of sale, if default should be made in the payments, or any part thereof, at the times agreed upon. Frear and Hallowell paid the interest on the mortgage up to May, 1816. The whole of the principal and interest from that time still remains due. In 1816, and for a long time after, General Tallmadge was a director and president of the branch of the Manhattan Company established at Poughkeepsie. He was also their attorney in relation to all matters and business transacted there. Slee's note had been discounted at that branch, on which there was due to the company \$2,000, and interest from the first of May, 1816. In August, 1816, he had stopped payment, a heavy judgment was standing against him, and his indorsees were considered in doubtful circumstances. Tallmadge, knowing of this bond and mortgage, mentioned the circumstance to the board of directors, and told them he would try to get an assignment of it to secure their debt. He applied to Slee for an assignment of the bond and mortgage, and gave him distinctly to understand it was intended only to secure the amount due to the Manhattan Company, and that the surplus, after satisfying their demand, would belong to him.

The appellant finally consented to assign the bond and mortgage, to secure the payment of his own debt to the company, and executed and delivered to Gen. Tallmadge, their attorney, an assignment indorsed on the mortgage as follows :

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*" For value received, I, Samuel Slee, within named, do assign over the within mortgage, and the bond belonging to the same, to the president and directors of the Manhattan Company, for the sum of two thousand dollars, with interest from the 1st day of May last, with power to

collect for their own use and benefit the sum of two thousand dollars, with interest from the 1st day of May last, in my name or otherwise; and I covenant and bind myself to them, that the sum of two thousand dollars principal is now due and owing on the same, and that that sum, with interest from the 1st day of May last, shall be paid upon the same by the mortgagors within named, on or before the 1st day of May now next, and that the bond and mortgage are valid and effectual, and that the premises within described shall, on foreclosure, sell for the said sum and interest and costs. Dated August 19th, 1816.

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Frear and Hallowell neglected to pay the amount due to the Manhattan Company by the time specified in the assignment, and in May, 1817, General Tallmadge, as their attorney, proceeded to foreclose the original mortgage, by a newspaper notice under the statute, and on the 10th November in the same year, bid in the mortgaged premises for the defendants, for the sum of \$700. A few days previous to the sale, Slee applied to him to know what was to be done, if at the sale any other person should bid over the amount due to the defendants, and contended, that by the original agreement, the defendants were bound to bid in the property to prevent its being sacrificed, even if they bid more than the amount of their own debt. Tallmadge told him he did not consider the defendants were to go so far; that he could not think of bidding more than the amount of their debt and the costs of foreclosing, and that if he wanted the property bid over, that he must get some friend to attend and go on with the bidding as far as he thought proper. He also told him that if there were other bidders, he should bid for the property to the amount of the bank debt, and if the defendants purchased in the property, it should remain as it was as to him, Slee, merely foreclosing Frear and Hallowell. Slee has always insisted on his right to redeem on paying

1828. the amount due to the defendants, and Tallmadge always
Slee so understood the transaction, and admitted *the justice of
v. his claim. In 1819, a committee of the directors of the
Manhattan company, including Mr. Remsen, the president, came to
Company. Poughkeepsie on the affairs of the bank, and were there
informed of the claim made by Slee to redeem the prop-
erty. In April, 1823, in pursuance of a written request
from Remsen, General Tallmadge communicated to him
by letter a particular statement of all the circumstances
relating to this property, and of the agreement which he
had made with Slee. In January, 1825, Slee made a
direct and formal application to the defendants for the
redemption and re-conveyance of the premises to him.
He requested an account of the rents and profits received
by them, and of the balance due from him, and offered to
pay all that was justly due on account thereof. The de-
fendants refused to permit him to redeem, insisting on
their absolute title to the premises under the sale of
November, 1810. In May, 1825, Slee filed his bill in the
equity court for the second circuit, setting forth substan-
tially the facts above stated, except the conversation
between himself and General Tallmadge immediately
previous to the sale, and praying an account of the rents,
issues and profits of the premises, or re-assignment of the
bond and mortgage, and a re-conveyance of the mortgaged
premises to him, on his paying the balance justly due, and
for general relief. The defendants demurred to the bill,
except that part thereof which sought an account of the
rents and profits of the mortgaged premises previous to
the statute foreclosure. The demurrer was argued before
Judge Betts, in August, 1825. He decided, that the
assignment of the 19th of August, 1816, was a mortgage
to the defendants for the security of the debt owing by
Slee; that his right of redemption therein had not been
legally divested, and the demurrer was overruled. The
defendants in their answer subsequently filed, admitted
most of the facts stated in the bill, but denied that the pre-

misses were bought in for the benefit of Slee. They admitted they had been in possession of the premises ever since that sale, by themselves or tenants, and had received the rents and profits thereof, and insisted, that by such sale they became the absolute owners of the premises, discharged of all legal or equitable claims of Slee thereon. Proofs having been taken in the *cause, it was submitted to Judge Emott, the successor of Judge Betts, on the pleadings and proofs and written arguments of counsel, and he decided that the assignment on its face was a mortgage or security for the company's debt; that the sale by the defendants under the statute was authorized by the assignment, and was a bar to Slee's equity of redemption in the premises; and the complainant's bill was dismissed. From the decree Slee appealed to this court.

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OPINION OF JUDGE BETTS.—The defendants' answer denies all receipt of rents and profits from the mortgaged estate, prior to the purchase by them under the statute foreclosure; and by demurrer they raise the question, whether the plaintiff shows enough upon his bill to entitle him to any relief since that period.

A mortgagee has a power coupled with an interest in respect to the mortgaged estate, (1 Caines' Cases in Error, 1,) and a general assignment divests his interest so effectually that a foreclosure by the assignee is valid as against the mortgagee without using his name, giving him notice, or in any way recognizing his connection with the mortgage. (7 John. Ch. R. 144.) A sale under a power pursuant to the statute, is equivalent between the parties to it, to a sale under a decree of Chancery. (10 John. R. 185.) The defendants were entitled to become purchasers at such sale, (1 R. L. 375, s. 10,) and as between them and the mortgagor, the estate would pass upon such purchase without the execution of any deed of conveyance. (4 Cowen, 266.)

This assignment, construed by itself, is clearly absolute, and vests the defendants with the whole estate and interest

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of the plaintiff in the subject. No relationship was created by it between the parties, other than to constitute the defendants trustees to pay over to the plaintiff any surplus beyond their debt and costs which might be raised upon the sale of the mortgaged premises; and the situation of the parties resulting from the assignment, and the consideration for it, does not necessarily imply that the defendants received it in any other capacity than that of purchasers. The foreclosure, therefore, vested the absolute estate in them also as against the mortgagee, unless the plaintiff has shown something more to *support his claim against the defendants than the mere instrument of assignment. The bill sets up an express contract of the defendants, to become trustees to the plaintiff in respect to the bond and mortgage and the mortgaged premises assigned them. It avers that the defendants, by their attorney and agent, applied to the plaintiff for the assignment, and proposed to receive it in trust to pay his note to them, and to pay back all moneys received by them above that, and on payment of the note by the plaintiff, to re-assign to him the mortgage, with the premises therein described; that he acceded to the proposal, and thereupon the defendants agreed to hold the bond and mortgage and mortgaged premises as security for the payment of the note, and in trust to pay back to him the surplus collected therefrom above his note, and to re-assign and re-convey to him the bond and mortgage, together with such right and interest as they might have in the mortgaged premises. And the bill further avers that the defendants took the conveyance of the premises on the sale, with intent to vest the title in them, to hold as security for the debt due them and in trust for the plaintiff, &c., &c.

These allegations are sufficiently comprehensive and distinct to denote a trust, and if it is of a character to be enforced in this court, the demurrer being both to the discovery and relief sought, is clearly bad. (3 Bro. Ch. Cas. 646, Eng. ed. note.) Equity considers collateral securities to creditors, as trusts for the better protection of their debts,

and will compel the fulfilment of their intentions. (1 John. Ch. R. 119.) This would, therefore, be a trust which this court must protect. The truth of these averments in the bill is to be taken as admitted by the demurrer, not a resulting trust, which can only be raised by the actual payment of money, the consideration upon which the estate vests, (2 John. Ch. R. 405; 5. id. 1,) but a trust connected with and part and parcel of the assignment, being the condition upon which the defendants took and executed the power, and demonstrating their capacity in relation to the plaintiff. The answer not alleging the trusts to have been in writing, it will probably be presumed in this court that they are to be proved by *parol. (2 Br. Ch. Cas. 568; 2 Dickens, 664; 5 Ves. jun. 554; 3 Br. Ch. Cas. 400.) But that mode of proof is admissible and competent, and has been received even to establish trusts in and concerning lands, *Harvey v. Harvey*, 2 Cas. in Chan. 180,) and is always received without question where the statute of frauds does not intervene. (1 Dall. 193; id. 424.) The general assignment becomes therefore qualified and special, and will be permitted to operate only as limited by the terms of the trust. (1 John. Ch. R. 119; 6 id. 417; 2 Cowen, 246.)

The bill seeking relief not upon the foundation of the written assignment only, but upon the trusts accompanying it, it presents a proper case for the interference of this court, unless the plaintiff's remedy is lost by lapse of time. It becomes, therefore, important to inquire in what character this assignment was made to the defendants, whether as mortgagees or trustees for the plaintiff, in relation to the mortgaged fund.

If no other interest was conferred upon the defendants by the assignment, than to dispose of the estate and pay over the money, most clearly they would be merely trustees to sell. This would not impeach their competency to purchase. The rule laid down by Lord Thurlow, *Crow v. Ballard*, (3 Bro. Ch. Cas. 119,) that it is impossible at any rate that the person employed to sell can be permitted to

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buy, has been explicitly denied in the English courts and ours, and is now no longer followed. The principle now recognized is, that he is entitled to no advantages from his purchase; but it is at the option of the *cestui que* trust to consider him a trustee and as holding the estate in his behalf. (*Whichcote v. Lawrence*, 3 Ves. jun. 740; *Campbell v. Walker*, 5 id. 678; 1 Caines' Cas. in Error, 20; *Munroe v. Allaire*, 2 id. 182.) The doctrine of these cases is repeated and sanctioned in *Provost v. Grants*, (1 Peter's Rep. 364,) and *Davoe v. Fanning*, (2 John. Ch. R. 252.)

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The South Carolina Court of Chancery have had the doctrine in two cases under consideration, but divided without settling the law. They would seem inclined to hold the purchase *absolutely void. (4 Dess. 486, 504, note; and again, id. 702.)

But though the *cestui que* trust has an election in this matter, it is not *ad libitum* as to time. It must be exercised within a reasonable period after he is apprized of the purchase. No general rule can be laid down with exactness, defining what shall be, in all cases, reasonable time. The numerous cases which have occurred and turned upon this point, have been decided on their own peculiar circumstances. Various periods have accordingly been adopted, at which the courts say the *cestui que* trust shall be presumed to have acquiesced in the purchase, and he is held absolutely concluded from disturbing it. *Bergen v. Bennet*, (1 Caines' Cas. in Error, 1,) was a foreclosure of a mortgage under the power, and the mortgagor was under sixteen years' acquiescence, knowing the sale, denied the right of redeeming. Judge Washington, (1 Peters' R. 368,) would seem only to require the fact of notice to the *cestui que* trust that the trustee had purchased, to raise a presumption of his acquiescence, and without notice, he denies a lapse of time to be a bar. Chancellor Dessausure refers to numerous English cases in which relief was granted after a lapse of 6, 7, 12, 14 and 20 years, to which may be added 2 Bro. P. C. 111; n. b., 15 Vin. 468, in which relief was denied after six years.

The result of the cases shows manifestly that courts do not consider it a matter of course to divest the purchase of a trustee, where he has acquired the formal legal title. A proper diligence must have been indicated on the part of the *cestui que trust*. In the present case, I should deny the plaintiff relief upon this ground. He was present at the sale and intimated no dissatisfaction with the defendant's purchase. He considered the sale absolute and not for his benefit, because he declined bidding, as he states, on account of his embarrassed circumstances. He allows the defendants to take the estate as owners, and never intimates a claim upon them until 1825. If they were only trustees to sell, equity, under all these circumstances, would presume the trust discharged to his approbation, and hold him now concluded from disturbing the sale. The defendants are permitted to avail themselves of *this objection by demurrer. (19 Ves. 180; 2 Sch. & Lef. 63; 1 Bro. P. C. 95.)

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The transfer of the security by the plaintiff to the defendants, is, in legal contemplation, a mortgage. The transaction throughout, as set up in the bill, was for the sole purpose of securing the plaintiff's debt to the defendants. An absolute sale of the mortgagee's interest cannot be implied by construction of the instrument against the direct averment of the plaintiff to the contrary, and the admission of that allegation by the defendants.

It is unquestionably the rule of this court and at law, that a deed, however absolute the terms may be upon its face, if really only intended to secure a debt, will be deemed a mortgage, though the defeasance is by parol. (1 John. Ch. R. 594; 4 id. 167; 6 id. 417; 7 id. 40.) It never loses the character and quality of a mortgage, and the right of redemption, as an inseparable incident, cannot be restrained or clogged even by the stipulation of the parties. (*Clark v. Henry*, 2 Cowen, 324, in error.) Lapse of time in this case cannot affect the remedy; for as against the mortgagor, possession by the mortgagee for any period short of 20

1828. years, will not bar the equity of redemption. (Anon., 3 Atk. 213; *Moore v. Cable*, 1 John. Ch. R. 385.)

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There is here no foreclosure of the plaintiff's interest. He not having been made a party to the proceedings against the original mortgagor, and none having been instituted for the purpose of divesting his right, his interest accordingly remains unaffected, and the mortgage created between him and the defendants yet alive and subject to redemption. (*Hobart v. Abbot*, 2 P. Wms. 642; *Johnson v. Hart*, 3 John. Cas. 322.)

The demurrer is overruled. The defendants are allowed 30 days to answer, on paying costs of the demurrer.

Costs would not have been allowed, had the demurrer been taken to the right of the party under the assignment alone; but an express agreement of the defendants being alleged, qualifying the character of that assignment, and showing it, instead of being an absolute transfer of his interest, only a pledge to secure his debt to them, the defendants ought to have answered that averment.

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*OPINION OF JUDGE EMOTT.—The bill in this cause states that George Hallowell and John B. Frear, on the 14th day of February, 1814, gave to the complainant a bond for the purchase-money of a lot in the village of Poughkeepsie, conditioned for the payment of four thousand dollars, and that on the same day they gave a mortgage on the premises, with a power to sell to secure the bond; that previous to the year 1816, the defendants established a branch bank at Poughkeepsie, making James Tallmadge a director and president of such bank, and that he was also the attorney and counsel of the defendants, "in relation to all business done and transacted at said branch," and that he continued to be such director, attorney and counsel during the whole time the branch remained at Poughkeepsie, and until long after the 19th day of August, 1816; that previous to the last mentioned day, the plaintiff had discounted at the branch bank a note drawn by him and indorsed by Joseph

H. Cunningham and Albert Cocks, on which there was due on the 1st of May \$2,000 ; that the plaintiff became embarrassed and unable to pay his debts, and had little or no property with which he could secure any of his debts, except the said bond and mortgage ; and both of his indorsers, prior to the 19th. of August, had become so insolvent that their names were not considered as adding much if anything to the security of the note ; that Tallmadge, acting for the defendants, on the 19th of August, 1816, applied to the plaintiff to assign the bond and mortgage to be held as security for the note, and in trust to pay to the plaintiff all moneys collected thereon above the amount due on the note, and on payment of the note by the plaintiff, to re-assign the bond and mortgage to him ; that the plaintiff assenting to such proposition, he, on the 19th of August, made an assignment on the back of the mortgage, by which, for value received, he assigned over the mortgage and the bond belonging to the same to the defendants for \$2,000, with the interest from the 1st of May, with power to collect for their own benefit such sum and interest, and covenanted that such sum was due and would be paid by the mortgagors, and that the securities were valid, and the premise should on foreclosure sell for such sum ; *which assignment was so made, with an agreement and understanding between the plaintiff and Tallmadge, acting as the agent and attorney of the defendants, that the defendants should hold the said bond and mortgage as security for their debt and interest, to pay the plaintiff such sum as might be collected thereon over the sum due to them, and on payment of their debt by the plaintiff, they were to re-assign to him the bond and mortgage : that immediately after the assignment, the defendants took possession of the premises, and have ever since held such possession, receiving the rents and profits, and that the rents which they have, or, but for their neglect, they might have received, amount to much more than the interest accruing on the said note ; that in May, 1817, the defendants commenced proceedings to fore-

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close the equity of redemption of Hallowell and Frear, by "duly" advertising under the mortgage for the 10th of November, and that on such day the mortgaged premises were duly sold at auction according to the requirements of the act; and that the complainant, "from his pecuniary embarrassments, being unable to purchase the premises or to bid upon the same," they were struck off to Tallmadge as the agent and for the benefit of the defendants, for the nominal sum of \$700. On the 11th of November, the defendants conveyed under the sale of Tallmadge, and Tallmadge, on the same day, quit-claimed to the defendants. The plaintiff alleges "that the said conveyances were made with the intention of vesting the title to said premises in the defendants, that they might hold the same as security for the sum due to them, and interest from the plaintiffs as already mentioned, and not to vest any title or interest in the premises in Tallmadge;" that the mortgaged premises now are, and ever since such foreclosure have been worth the sum for which they were mortgaged by Hallowell and Frear; that the plaintiff is, and for a long time past has been ready to pay such sum as may be due to the defendants for their demand, after deducting the rents which they have or might have received, and he has frequently offered them to pay such balance as soon as they furnish him with a full and accurate account of the same. In particular, he says he applied for such purpose to the *defendants on the 18th of January, 1825, and again on the 7th of May, 1825; but they have hitherto refused.

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The defendants, in their answer, admit that James Tallmadge was a director and president of their branch bank at Poughkeepsie, and was also their attorney and counsel in his professional capacity; but not otherwise in relation to business done and transacted at the branch generally. The defendants, in answer to the inquiry about the assignment, say that the plaintiff, on the 19th of August, 1816, being indebted to them on his note in \$2,000, as a security for the payment of such debt, agreed to assign to them the

bond and mortgage, and thereupon did make the assignment which they set forth. They admit that the assignment was made to be held as a security for their debt as expressed in the assignment, but they deny that the assignment was made with any agreement or understanding between the plaintiff and Tallmadge, acting as their agent or otherwise, or between the plaintiff and themselves, "that they should hold the bond and mortgage with the mortgaged premises in trust for the plaintiff, to pay him the overplus money or to re-assign to him," or upon any terms, trust or condition, other than what is expressed in the assignment, or that there was any agreement or understanding in relation thereto, other than what is contained in the assignment. As to the sale, they say "that it was on their own account, and not as assignees having a trust for the plaintiff other than such trust as is contained in the assignment; and that it was made with a view to sell the property for such sum as could be obtained for the same, and to have their debt paid, and not for the purpose merely of foreclosing the equity of redemption of Hallowell and Frear." The defendants allege that Slee resided at Poughkeepsie, and was acquainted with the sale; and they charge that the plaintiff knew of their purchase, and never set up or pretended any interest in the premises, or that the defendants were at all accountable for, or held the same in trust for him, or gave them any notice or intimation that he should consider them as trustees for his accounts, or pretended any right or intention to redeem until January, 1825, more than seven years after the sale; and on the contrary, he, during *all that time, suffered the defendants to treat the property as their own.

The only witness examined on the part of the plaintiff, who testified relative to the assignment and sale, was Gen. Tallmadge. He testified that the plaintiff and his indorsers being in doubtful circumstances, he applied to the plaintiff to make an assignment of the bond and mortgage of Frear and Hallowell, and held out by way of inducement certain

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benefits to the plaintiff, which related to certain bonds and mortgages given by him to the Van Benschotens, and which benefits the plaintiff afterwards realized through the agency of the defendants. He says he pressed the plaintiff to make the assignment, and always spoke to him that all over the \$2,000 would remain to him: the proposition always was, that the plaintiff should have the surplus. He also says, there was no express agreement that the plaintiff should have the surplus, but all the propositions and conversations of himself with the plaintiff were based upon the supposition that the plaintiff was to have the surplus. He testified further, that in the spring of 1817, he commenced proceedings to foreclose the mortgage by advertising for the bank, and sold the premises in the fall. A few days before the sale, the plaintiff called on him and wanted to know what was to be done in case there was a bid over the \$2,000; he wished the bank to bid at least \$3,500. To this he replied, that he had fulfilled his agreement in removing the Van Benschoten mortgage, and that he did not think the bank was bound to bid more than the amount of their debt; that if the plaintiff wanted the property bid over, that he must get some friend to attend and go on with the bidding as far as he thought proper. The plaintiff then said he had no funds to go on with the bidding; to which the witness replied, that he needed no funds, as his receipt would answer for all over the bank debt. The plaintiff said he had no friend to come forward except the witness; to which he replied, that he could not consent. Witness then told the plaintiff that he should bid for the property the amount for the debt, and if the purchase was made under that sum, the property should remain as it was as to the plaintiff, only foreclosing Frear and Hallowell. The *understanding of the witness was, and ever since has been, that the plaintiff would be entitled to the overplus money, only foreclosing Frear and Hallowell. At the sale, some one bid \$500; witness bid \$700, and the property was struck off to him. The property was then worth

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\$3,500, and is now worth \$3,000. He does not know that the plaintiff had any one to bid at the sale. The plaintiff has at all times, and in all conversations with the witness, claimed a right to redeem; and he has always admitted it. In the summer of 1819, a committee of the bank came to Poughkeepsie on the affairs of the bank, and witness understood from them that the plaintiff had claimed the property; but witness thought they did not understand it. He had stated the claim of the plaintiff to Mr. Remsen, the president of the company, many times, and in particular by letters of the 2d of March and 20th of April, 1823. On his cross-examination, the witness said that there was no specific agreement at the time of the assignment, nor was there any specific agreement; but it was well understood that the plaintiff was to have the surplus. The plaintiff did not require the property to be sold. The sale was fair, public and open.

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There is much repetition in the testimony of Mr. Tallmadge, owing to the mode of the examination, and the natural desire on the part of the plaintiff to have his understanding and views placed in full relief. What has been mentioned gives in sufficient detail what was testified to by him for all the purposes of this opinion.

The assignment has been introduced. It is on the back of the mortgage, is dated the 19th of August, 1816, and is under the hand and seal of the plaintiff. It, for value received, assigns over the bond and mortgage to the defendants for the sum of \$2,000, with interest from the 1st of May, with power to collect for their own use and benefit such sum in his name or otherwise. The plaintiff covenants that such sum is due, and will be paid by the mortgagors by the first day of May then next; that the bond and mortgage are valid; and that the premises on foreclosure, will sell for such sum.

*On this state of facts, the plaintiff claims a right to redeem on three grounds: 1. Because the foreclosure itself was informal and imperfect, the assignment being but for

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part, leaving an interest in him which made him a necessary party, (plaintiff, if we may so term it,) to the advertisement; 2. Because the plaintiff is not bound by the foreclosure, and that he could alone be barred by a foreclosure in Chancery to which he was a party; 3. Because the defendants were trustees for the plaintiff, and they cannot therefore avail themselves, as against him, of their purchase.

- Let it here be remembered that the plaintiff's claim, made by his bill, is not founded, and was probably not intended to be founded on fraud. If he had set up a distinct and available fraud, either in the assignment or sale; if he had, by his great confidence in the defendants or their agents, been induced to give an absolute instead of a defeasible assignment, or a pledge of his security for an amount not due; if he had been lulled into a false security at the sale by the fraudulent representations, or what would have amounted to the same thing, the unperformed promises of the defendants or their agents, so that he had not taken the measures which he intended and which he had in his power, the fraud would have created a trust which might have been enforced here without any writing. But no such fraud was presented by the plaintiff in his bill, and it could not therefore be made by the court a ground for relief, even if it appeared in the testimony. When speaking of a fraud which might have been made a ground of claim, I have termed it an available fraud, to distinguish it from frauds which are not so. Such frauds are now a distinct head in equity, and there is almost as much certainty about them as about any other part of Chancery jurisdiction. But there are frauds which Chancery cannot and dare not face and relieve against; frauds which are protected by statute, or covered up by the general rules and maxims of the court. Able counsel and grave judges frequently say that the statute of frauds shall not be made an instrument of fraud; and yet it is not difficult to show, and most professional men have seen, that this statute, with its high

title, may be made and has been made an instrument of *fraud. It is merely necessary to advert to the rule which makes age a test for capacity, and therefore invalidates the contracts of minors, as one which has covered many and great frauds by persons of mature mind, and to the law of this court, that parol evidence shall not be permitted to contradict or substantially vary the legal import of a written agreement, as frequently and necessarily making a new contract for the parties, by which fraud receives a premium.

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General laws and general rules are necessary for the purposes of society; and they are emphatically necessary to save parties against the passions, the mistakes and the false views of judges. When the judge applies the laws to the case, there is safety. When he passes on each case individually, with no rule but that of his feelings and discretion, there is great danger to the parties. The injuries inflicted by general rules are casual, but those which would spring from an unqualified discretion in the judge, would be continual and most mischievous.

It must not be inferred from these remarks, that I have discovered anything like a technical fraud in the testimony in this cause with respect to the assignment. If it is in its terms, as I think it is, a mortgage to secure the smaller demands of the defendants, it is, of a necessary consequence, to give to the plaintiff a right to the surplus, and a right to redeem if he came in time. This is all that was or could be intended, and all that Gen. Tallmadge can testify to. In the assignment, then, there is no shadow of fraud. In the sale, if there was an understanding or a wish that the purchase might, as between these parties, leave the property as it found it, and it turns out otherwise, still there is no technical fraud, as the plaintiff had avowedly neither money or friends to aid him; and so far from being persuaded not to bid, he was advised to the contrary. The case, therefore, as far as it shows a loss to the plaintiff, is a case of hardship, not perhaps to the extent pressed in the court, inasmuch as

1828. no attempts have been made to collect anything on the note, and so much time has elapsed that the remedy must now be gone, if the wish remained to get the residue, or if the plaintiff could respond to it. As a case of hardship, however *much my feelings may be awakened or enlisted, I am bound to take care that my judgment should remain free to decide as the law directs. It will be seen that I do not look at the testimony of Gen. Tallmadge as very essential. The cause, were it otherwise, standing as it does in opposition to the direct and positive answers made by the defendants to questions put to them by the bill, no decree could probably be founded on it. As far back as 1888, we find it established, that there being but one witness against the defendant's answer, the plaintiff could have no decree; (1 Vern. 160;) and the rule remains to the present day, though the reason of it is not very apparent, or at least usually given for it. That it is oath against oath, is not altogether conclusive. (1 Br. Ch. Cas. 52.)

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The first question to be considered is, whether the statute foreclosure was formal, the plaintiff not having joined in the advertisement. The objection is, that inasmuch as the plaintiff had an interest in the mortgage, he was a necessary party; and to support this objection, I am referred to the opinion of Mr. Justice Woodworth, in *Wilson v. Throup*, (2 Cowen, 281,) in which he says, speaking of these foreclosures, "The act contemplates that the notice be given, and the sale made by the mortgagee or others thereunto authorized. If the mortgagee has assigned all his interest, notice must be given by the assignee. If a part of the bond and mortgage is assigned, the mortgagee and such assignees are the proper parties." This objection necessarily leads to a consideration of the nature of the instrument; and when that is ascertained, we shall be able to see how the reasoning of the judge operates on the foreclosure. In a former stage of the cause, this paper appears to have been the source of considerable perplexity. Sometimes it was viewed as an absolute assignment of all interest in the bond and mort-

gage; and this probably caused Gen. Tallmadge to say, when he testified, that "he never would have acted as agent in the transaction of Slee, was he to have lost all benefit in the surplus, and that all the conversations were based on the supposition that he was to have the surplus." At other times it was spoken of as a declaration of trust, and then it was treated as a *mortgage; and yet it appears to me that the paper is so marked as to leave no reasonable doubt of its kind and character. There is nothing technical in it to bind, nothing obscure to embarrass. The intent is palpable, and everything is left clear to have the intent carried into effect.

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The instrument commences, "For value received, I assign over the within mortgage and bond belonging to the same." Here is the act done, a transfer of the entire security. It proceeds, "for the sum of \$2,000, with interest from the first day of May, to collect for their own use and benefit the sum of \$2,000 and interest," with covenants that so much is due and will be paid by the mortgagors by the first day of May then next, and that the premises will bring such sum on foreclosure. Here is the object: a security for an existing debt, and it gives power to collect in the name of Slee or otherwise. Here is the express authority given to enforce the security assigned. It is nothing more or less, from its very form, than a pledge for a debt of \$4,000 for securing a demand of \$2,000; and then follows the law of this court, that every contract for the securing of money by a conveyance of property, either personal or real, is in equity deemed a mortgage. This established, then follows, as a necessary consequence, and without any express stipulation, the right to redeem, (2 Atk. 490,) and the right to the surplus.

The assignment is of the whole interest. Although being for a particular purpose, it may be satisfied with a part. Indeed, in all cases of mortgages, the transfer, as far as relates to the remedy, will be taken to be entire and exclusive, unless made otherwise by express stipulation, as being

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necessary to enforce the right. The remedy by suit on the ~~on~~ bond, and of foreclosure on the mortgage, if a divided one between the mortgagor and mortgagee, would produce delay and vexation, and would make an appeal to the Court of Chancery necessary in almost every case. In the common case of a mortgage with power to sell, it would be strange to ask the mortgagor to join with the mortgagee in the advertisement; and yet the mortgagor has an interest in the property, and in many cases far beyond that of the mortgagee. Nor is there any more reason in this case that the plaintiff should have *joined in the notice of sale. It was in truth adverse to him. The reasoning of Judge Woodworth is not, therefore, applicable, and is based on a different state of facts; and I think we may safely conclude, that the advertisement, as far as it will serve any purpose, was rightly made in the name of the defendants.

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The next question is, whether the plaintiff is bound by the statute of foreclosure, the proceedings being regular and not tainted by fraud. The mortgage, at its introduction, created an estate upon condition, and the estate became absolute when the condition was not performed. (Litt. sec. 832.) There was no such thing known as an equity of redemption, and Lord Hale observes, that in 14 Rich. 2, the parliament would not admit of redemption. (1 Ch. Cas. 219.) Mr. Butler remarks that it was admitted soon after, (Co. Litt. 203 b. note 96,) but Mr. Fonblanque says, that although the right is now incontrovertibly established, he has not been able to trace the period when such right was first established. (2 Fonbl. 260, note c.) This right being an equitably one merely, could only be enforced in Chancery by a bill to redeem, and this bill was entertained until the right was extinguished by a bill to foreclose the equity of redemption. Early in the last century, an attempt was made, by inserting in the mortgage a power to sell free from redemption, to create a trust in the mortgagee for such purpose, so that the right to redeem might be extinguished without having recourse to a court of equity; but it did not

succeed, the Court of Exchequer ruling against the power and the sale under it. (*Craft v. Powell*, Com. R. 603.) From the inconvenience resulting from the difficulty of the delay and expense attending a bill to foreclose, a new attempt has been made in England to get rid of them, by taking the conveyance of the fee to trustees in trust for the mortgagee for a term of years, subject to redemption, with remainder to the trustees in trust, in default of payment to sell the estate, and to apply the purchase-money, after defraying the expenses of the trust, in payment of the mortgage-money and interest, and then to pay over the residue to the mortgagors. (1 Pow. on Mort. 13.) Mr. Powell doubts the success of this experiment, but I am not aware that it has been put down by the decision of any court.

*About the period of the case of *Craft and Powell*, a question arose, whether exchequer annuities could be sold without a foreclosure in equity, when Lord Harcourt ruled against the sale; but on appeal, this decision was unanimously reversed by the lords, one of the grounds taken for the reversal being the known and constant practice, in the case of a mortgage of such securities, to proceed to a sale on an eight or ten days' notice. (*Tucker v. Wilson*, 1 P. Wms. 261; 5 Br. Parl. Cas. 193.) This reversal took place in 1714, and since that time it has been uniformly held in the English equity courts that a bill of foreclosure is not necessary in a mortgage of stock, while it must be brought on a mortgage of land. (*Lockwood v. Ewer*, 2 Atk. 308; *Kemp v. Westbrook*, 1 Ves. 278.) The reason for this difference is not very obvious; and we may be allowed to consider the system of Chancery foreclosures as originating in a desire to protect and continue a landed aristocracy, rather than as proceeding from any fixed principle of equity; otherwise it is difficult to conjecture why a bill to foreclose should be required in the case of a mortgage of a small real estate, while a much greater interest in the funds, according to its money value, may be disposed of by the mere act of the party holding the security.

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 in England, not to permit a foreclosure by the creation of
 a trust and sale by trustees, as such foreclosure would save
 a great and unnecessary expense, and would be as safe to
 the party, as he would have the selecting of his agent.

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There is no point of policy which ever called upon us in this country to adopt, to its full extent, the English practice; and, in truth, our doctrine of mortgages and foreclosures seems, at an early day, to have varied materially from that of the mother country. In England there was no desire to raise up a large and permanent landed interest in the colonies; and hence, so far from fencing round real estates, by regulations or instructions, they at an early day authorized the sale of lands on an execution in the colonies, and we were left to fashion our laws and customs on this subject according to our own views and caprices.

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*The first of our statutes on the subject of mortgages, is that of the 12th December, 1753, for preventing frauds by mortgages to be made after the first day of June, and which provides for their registry. On the 19th of March, 1774, more than twenty years afterwards, another law was passed, reciting that the former statute had been eluded by the making of absolute conveyances of real estate, and the giving of conditional defeasances instead of mortgages in common form; and it is enacted, that every deed conveying a real estate, made after the 1st of June, which shall appear by any other instrument to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage, and be adjudged as coming within the registry act. I refer to these as showing that we had a system of our own. In England, the Chancery decisions for centuries had made such conveyances mortgages, and yet at this late period, when the English laws were perfectly understood here, and when we had a most able and learned bar, this statute was deemed necessary,

and so far from being declarative, its enactment is prospective.

With us, in the first stages of our colonial government, lands were easily procured, and were not valued more than personal property. The party holding a mortgage on real estate was accordingly permitted, under a power for such purpose, to sell without a bill of foreclosure, as he might on a mortgage of personal property. The state of the courts, too, made this necessary, as it will be recollected that the Court of Chancery, as held by the governor, was deemed an usurpation. In 1735, we have a resolution of the assembly, that a court of chancery within this colony, in the hands or under the exercise of a governor, without consent in general assembly, is contrary to law, unwarrantable, and of dangerous consequence to the liberties and property of the people. In 1737, we have the address of the assembly to Lt. Governor Clarke, in which the court is again treated as illegal, and it is added, that the court, as managed, proved of no use to the public or benefit to the governor; for as few of them had talents equal to the task of a chancellor, which they had *undertaken to perform, so it was executed. Accordingly, some of them being willing to hold such a court, others not, according as they happened to be influenced by those about them, so that, were it established in the most legal manner, yet being in the hands of a person not compellable to do his duty, it was so managed that the extraordinary delays and fruitless expense attending it, rendered it not only useless, but a grievance to the inhabitants, especially those who were so unfortunate as to be concerned in it.

Mr. Smith, the historian, himself an able lawyer, writing in 1756, says of the Court of Chancery, "Of all our courts, none has been more obnoxious to the people than this." He remarks, that from the time of the memorable address of 1737, the Court of Chancery has been unattacked by the assembly, but that the business transacted in it was very inconsiderable. We can now be at no loss to deter-

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mine why these powers were resorted to. A court so constituted and questioned, and exercised, could hardly be considered as existing for any beneficial purpose, and hence the necessity of some mode of foreclosure other than by bill.

These powers accordingly took deep root, and to prevent any questions as to sales under them, the act of the 19th of March, 1774, was passed; the second section whereof reciting that many real estates were held under sales made by mortgagees, who were authorized by the mortgagor to make a conveyance of the same for the payment of the debt, and to return the overplus, and thus many inconveniences might arise if such estate should be redeemable in equity, vexatious suits promoted, and *bona fide* purchasers ruined. And it is enacted, that no good and *bona fide* sale of lands made or to be made by mortgagees or others, authorized by a special power, shall be defeated to the prejudice of the *bona fide* purchaser, in favor or for the advantage of any person claiming a right of redemption in equity, with a saving to other mortgagees and to judgment creditors. With respect to sales after the passing of the act, it is provided that they shall be at public auction, and on a six months' notice. In our first revision after the revolution, these provisions, with the recital, are by the statute of the 21st of February, 1788, adopted in *terms. In the revision of 1801, the same provisions are substantially adopted in the act of the 6th April, 1801; and in the revision of 1813, the clause in the last act is inserted in the very words in that of the 19th of March, 1813. It is now established by statute, that no sale of any lands made or to be made in due form of law, by any mortgagee or others thereunto authorized by special power for that purpose, from any person entitled to the equity therein, shall be defeated to the prejudice of any *bona fide* purchaser in favor or for the advantage of any person claiming such redemption in equity, saving, however, the rights of subsequent mortgagees and judgment creditors.

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I have gone into this detail to show that these powers, and the sales under them, are as ancient as the formation of the English government in this state; that they were adopted from necessity, and have always been deemed a safe and cheap mode of foreclosure, and that they have received the deliberate and repeated sanction of the legislature. Were we now passing on them for the first time, we might ask, why the mortgagee should be turned over to the Court of Chancery, when he gives the parties interested ample time and notice to redeem, and when the sale is made openly and subject to all the bidding and competition which could take place at a master's sale? The foreclosure is simple, cheap, and apparently as little liable to abuse as a judicial foreclosure; and the proceedings have accordingly been received favorably by our courts. In *Jackson v. Henry*, (10 John. R. 193,) Chief Justice Kent, in delivering the opinion of the court, says, that the statute renders such sale equivalent to a foreclosure and sale under a decree in Chancery. In *Doolittle v. Lewis*, (7 John. Ch. Cas. 45,) Chancellor Kent says: It is the policy as well as the language of the statute, that these foreclosures and sales under a power, should, in cases free from fraud and gross irregularity, be held final and conclusive. And in *Wilson v. Throup*, (2 Cowen, 202,) Chancellor Kent says: The statute foreclosure is cheaper and more simple, and generally more expeditious than a foreclosure by bill in Chancery. And in each of these cases, the sales, although sought to be impeached and set aside, were affirmed. As to the person bound by the foreclosure, the statute *makes it binding on all persons claiming the redemption in equity, with the exception of any other mortgagee of the same premises, or any part thereof, whose title accrues prior to such sale. The statute foreclosure has technically, as well as in truth, no parties; the advertisement being a simple notice that a mortgage has been given, and that the property is to be sold under the power. It names none but the person who gave the mortgage, and him only as descriptive of the

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1838. mortgage, and yet binds heirs, devisees and subsequent purchasers, whether immediate or derivative, or in the words of the statute, all persons claiming the redemption in equity. If the plaintiff, therefore, here is not bound by the sale, it must be because he comes within the words of the proviso or exceptions. In *Demarest v. Wynkoop*, (3 John. Ch. Cas. 144,) Chancellor Kent, speaking of the infancy of some of the persons interested in the mortgaged property sold under a power, says: The statute has no saving clause for persons laboring under disability, but is peremptory that no sale under such power shall be defeated, to the prejudice of any *bona fide* purchaser, in favor of any person claiming the equity of redemption; and when the statute makes no exception, the court can make none. To such claim by him, it seems to be a sufficient answer, that he is not a mortgagee of the same, or any part thereof, with a title accruing prior to the sale. In truth, if his assignment constitutes him a mortgagor or mortgagee of the lands, he is the former and not the latter, and therefore not within the saving of the statute. But it is doubtful whether he is to be considered as one or the other, and whether he is not merely the pawner of a debt to secure a demand against himself.

In *Brewer v. Gibbs*, (Prec. in Chan. 99,) the Chancellor declared that a mortgage is looked upon as a personal contract, and that the mortgagee has no interest beyond his money. In *Jackson v. Blodget*, (5 Cowen, 202,) it was held that the assignment of a bond or debt secured by mortgage, passed the interest in the mortgage, the debt being the principal, the mortgage the accessory. In *Johnson v. Hart*, (3 John. Cas. 322,) in error, it is held that the debt secured by mortgage is considered as personal estate, and may be disposed of as such. In *Green v. Hart*, (1 John. Rep. 541,) it *is said that mortgages are not now considered as conveyances of lands within the statute of frauds; and that the forgiving of the debt with the delivery of the security is an extinguishment of the mortgage. And in the spirit

of these cases, it is said in *Jackson v. Craft*, (18 John. 110,) that if a legal tender is made of the money due on a bond and mortgage to the mortgagee or his attorney, which he refused, the land is discharged from the mortgage, though the debt remains. And in *Jackson v. Stackhouse*, (1 Cowen, 122,) the court held that a release of the debt discharges the mortgage; and that in an ejectment by the mortgagee, the defendant may defeat the action, by proving by parol that the mortgage debt was paid. The assignment of the mortgage, therefore, in this case, without the bond, would have been a mere nullity; and whatever may be the form, the substance of the transaction was a pledging of the debt by way of security, such pledge carrying with it as an incident, the mortgage. There was, then, no mortgage of the same premises, or any part thereof, made by this assignment, nor was there any necessity or use in a bill of foreclosure against the plaintiff, as his interest which was in the debt was not to be sold, but the interest of the mortgagor which was in the land, in order to raise the debt. If a bill had been filed, the plaintiff would not have been a necessary, if a proper party. He had withal, by the terms of the assignment, authorized the collection of the moneys in his name or otherwise, and the advertisement and sale under the mortgage were nothing more than a means of enforcing and collecting the debt. I am, upon the whole, after great consideration, of opinion that the plaintiff is bound by the statute foreclosure.

The third question is, whether the defendants were not trustees for the plaintiff, and therefore as against him cannot avail themselves of their purchase. It cannot be necessary to examine the general doctrine of sales and purchases by trustees to decide this point. The courts certainly have gone very far towards establishing, that if a trustee under a sale not judicial becomes the purchaser, the *cestui que trust* may regard the trust as still continuing. I am not now allowed to say whether the doctrine has not been carried too far, but I am certainly not disposed to extend it to a

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new class of cases. That in mortgages and in the assignment of securities where the assignor retains or may have an interest, there is, in the language of the Court of Chancery, a trust, there is no doubt. But it has never been held that such trust created an incapacity in the mortgagee or his assignee to become a purchaser; and where the sale was fair and in good faith, the case has not occurred wherein the mortgagor or assignor has succeeded in setting aside the sale. It is true that in *Bergen v. Burnett*, in 1804, (Caine's Cas. in Err. 1,) it was contended that the mortgagee is a trustee, and therefore could not purchase. The opinion of the court was delivered by Justice Kent, the inclination of whose mind was evidently against the objection, although he declined deciding on it, as not being necessary in the case. He observes that it is a sound and established rule of equitable policy, that a trustee cannot himself be a purchaser of the trust estate without leave from Chancery, and that it had been so ruled in the case of *Monroe v. Allaire*; but he says a distinction was there taken between the case of a suit against a trustee to set aside a purchase, he having procured the formal legal title, and when a suit was by him commenced to complete his purchase, and it was observed that equity would not interfere as of course to set aside the purchase; for although equity will not aid, it is not bound in every case to disturb such a purchaser; and that it is also a question whether the rule would apply to the case of a trustee who was himself a *cestui que* trust, and was obliged to purchase in order to avoid a loss to himself by a sale at a less price. The objection thus raised and not directly passed on by the court, produced the fifth section of the act to amend the act concerning mortgages of the 6th of April, 1808, whereby it is enacted that no title to mortgaged premises derived from a sale under a power shall be questioned, impeached or defeated, either at law or in equity, by reason that the mortgaged premises were purchased by the mortgagee, or his assignee or legal representative, or for his benefit or account,

so that the sale is in other respects regular, fair and with good faith. In fact, the greater part of the purchases under such powers are *and always have been made for the mortgage, and this of necessity; for without the power and right of making the purchase, the security of the mortgagee would be greatly impaired, inasmuch as no one might be present, or from the state of the property or the title, willing to bid to the amount of the incumbrance. The interest of the mortgagor also is best saved by the competition of the mortgagee at the sale, being an open and public one after a long notice. To have decided against such purchases would have hazarded too many titles, and been too much at variance with the received opinion of the best informed lawyers, to have been ventured on lightly. The case of *Jackson v. Henry*, (10 John. 185,) is very strong to show the general opinion on this subject. It was a case of sale under a power by an assignee, and a purchase for his benefit in 1805, and after the decision of the cause of *Bergen v. Burnett*. The assignee acting in the transaction for himself, was and is one of our most accomplished and able lawyers, of extensive practice and clear perception; and the validity of the sale was not questioned, although the cause was warmly and ably contested. The right of the mortgagee or his assignee to purchase, may also be considered as settled by the case of *Wilson v. Throop*, (2 Cowen, 195,) and *Jackson v. Colden*, (4 Cowen, 266,) but on grounds more general. I may say with Mr. Justice Platt, in *Franklin v. Osgood*, (14 John. 561,) that I have not been able to perceive any foundation in reason or authority for the objection that a *co-cestui que* trust may not purchase for his exclusive benefit. I have not thought it necessary to examine particularly the testimony of General Tallmadge about what took place at the sale, because it standing in opposition to the answer and alone, no decree could be founded on it, because it establishes no agreement, and if it did, it is opposed to the statute of frauds.

Upon the whole, after the most anxious consideration, I

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1828. cannot bring myself to believe that the plaintiff has made
 out a case for redemption. There is certainly an appear-
 ance of hardship in his case; but with that judicially I
 have no concern. I have to test his claim on the broad
 principles of equity law; and applying those to the best of
 my judgment, *I think I am bound to decree a dismissal
 of the bill; but I do this without costs, as the understand-
 ing of General Tallmadge, the agent of the plaintiff, was a
 sufficient excuse for the making of the claim.
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Bulkley & P. Ruggles, for appellant:—The assignment of the mortgage to the defendants, was a mortgage of a mortgage on its face. If it had been absolute, it could have been explained by parol. (*James v. Johnson*, 6 John. Ch. Rep. 417. *Moses v. Murgatroyd*, 1 John. Ch. Rep. 119. *Banker v. Prentiss*, 6 Mass. Rep. 430. *Henry v. Davis & Clark*, 7 John. Ch. Rep. 40. Same in error, 2 Cowen, 324. *Marks v. Pell*, 1 John. Ch. Rep. 594. *Strong v. Stewart*, 4 John. Ch. Rep. 167.)

The foreclosure was not conclusive against the complainant; it was only so against the mortgagors. (1 R. L. 373.) The defendants, after their purchase, became trustees for the complainant. They are not entitled to the money paid out for insurance, (1 Hop. 283;) and they are bound to account to the complainant for all the rents and profits, since the sale, they might have received. (2 Mad. 457.)

The complainant is not barred by lapse of time, having made his claim in due season. (2 Mad. 326.) Notice to the agent is notice to the principal. (Amb. 626. 1 Ves. sen. 62; 2 Vern. 574. *Blenkarne v. Jennens et al.*, 1 Brow. P. C. 244. *Coote et al. v. Mammon et al.*, 2 id. 596.)

The complainant is entitled to redeem, on payment of the amount due, after deducting the rents received; he is also entitled to costs. (*Detillin v. Gale*, 7 Ves. 583, 7. 1 Ball & Beat. 121, note, and 264. *D'Anver's Ab.* 71. 3 Bro. Ch. C. 236. 6 John. Ch. R. 411. 4 John. Ch. R. 78. 1 John. Ch. R. 82. 11 John. 555. 8 Com. Dig. 767, Am. ed. 1

Eden's Rep. 169. 7 John. Chan. Rep. 40. 2 Cowen, 824, S. C.)

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Slosson, for respondent:—A party can only have relief upon the case made by his bill. The bill alleges neither fraud nor mistake, and therefore the appellant's claim cannot be supported upon either of these grounds. (*James v. McKerman*, 6 John. R. 543, 559. *Gouverneur v. Elmendorf*, 5 John. Ch. R. 82.) As to the assignment, it is not material whether *it was a pledge or a mortgage; the power of sale passed by it, together with the authority to execute the power. (*Jackson v. Blodget*, 5 Cowen, 202. *Green v. Hart*, 1 John. Rep. 590. *Jackson v. Willard*, 4 John. Ch. R. 43. *Wilson v. Throop*, 2 Cowen, 238, 9.) No precise form of words is necessary to confer this power of sale. (Sugden on Powers, 97, ch. 2, sec. 1.) A sale under a statute foreclosure was the one contemplated by the assignment. By the sale, all the rights of Slee were barred. If a stranger had been the purchaser, he would have taken the fee divested of all claims on the part of Slee. On a valid execution of the power, the purchaser is under the original mortgage. (Sugden on Powers, 331, 333. *Doolittle v. Lewis*, 7 John. Ch. R. 45, 48. *Duke of Marlborough v. Godolphin*, 2 Ves. sen. 61, 73. Co. Litt. 113, a. Litt. sec. 169.) An execution of a power by executors, divests the estate of the heir and all intermediate estates between the testator and purchaser. If this assignment was a mortgage, and the respondents could purchase at the sale, there is a complete change or determination of the relation of mortgagor and mortgagee. If the assignment was a pledge of a chose in action, the title became absolute in the respondents upon default of payment. (*Ackley v. Finch*, 7 Cowen, 290. *Brown v. Bement*, 8 John. 96.) If the respondents are trustees, they must be so by agreement, or upon the ground that the consideration proceeded from Slee. On the last ground they cannot be; for the consideration did not proceed from Slee. A trust by implication cannot be raised, unless the

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1898. consideration proceeds from the *cestui que* trust. (5 John. Ch. R. 19, 20. 2 John. Ch. R. 509.)

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The respondents are not trustees by agreement. There was in the first agreement no prospective trust on a subsequent foreclosure. The agreement at the time of sale cannot be connected with the original assignment; and it must be governed by the rules of law applicable to such agreements. Parol evidence cannot be received as to the last agreement. It is not admissible upon the ground of fraud or imposition. (*Hall v. Shultz*, 4 John. 240. 14 John. 358. 1 R. L. 79.) The statute of frauds requires all declarations of trust relating to lands to be in writing. The character of the respondents *as mortgagees became extinguished as soon as they became purchasers. Slee is precluded from redeeming by delay. (1 Brown's P. C. 414. 2 Eq. Cas. Ab. 17.) If a trustee is a *cestui que* trust as to part, he may purchase. The respondents are at all events only answerable for the amount actually received, and they must be allowed for the money paid for insurance. (2 Eq. Cas. Ab. 17. Hoffman's Chan. 241.)

THE CHANCELLOR: In the opinion of Judge Emott, which is sent up with the other proceedings, agreeably to the rule of this court, he has examined the several questions raised before him with much learning and ability, and at great length. I regret that the business of this court will not allow me as much time to examine some of these questions as I could wish, especially as on the merits of this case, he has come to a conclusion directly contrary to that of his predecessor, whose opinions are also entitled to great respect, particularly on a question of Chancery law.

One objection, which from the opinions of the judges appears to have been made in the court below, it is not necessary to examine here, as it is now admitted by the defendant's counsel, that the assignment to them from Slee is, on its face, nothing but a mortgage. Even if the instru-

ment itself was an absolute assignment of his whole interest in the bond and mortgage, this court, from the facts stated in the bill and established in the testimony of Gen. Tallmadge, would be bound to consider it nothing more than a security for the payment of the debt due to the Manhattan Company. From the uniform decisions of this court, many of which have been sanctioned by the court of *dernier resort*, there can be no doubt at this day that parol evidence is admissible to show that a deed or conveyance, absolute on its face, was intended by the parties only as a mortgage or security for the payment of money.[1] (*Clark*

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[1] As to the general doctrine, see 2 Cowen & Hill's notes to Phil. Ev. 574—579. In England *Maxwell v. Montacute*, 1 Prec. in Ch. 526; *Walker v. Walker*, 2 Atk. 99; *Joyne v. Stratham*, 3 id. 389; *Vernon v. Bethel*, 2 Eden, 113; *Harris v. Horwell*, Gilb. Eq. Ca. 11; *Dixon v. Parker*, 2 Ves. Sen. 219. In the United States Court, *Hughes v. Edwards*, 9 Wheat. 489; *Hunt v. Adms. of Rauemanier*, 1 Pet. 1. New York, *Brown v. Dewey*, 1 Sanf. Ch. 57; *Marks v. Pell*, 1 John. Ch. 594; *Strong v. Stewart*, 4 id. 167; *James v. Johnson*, 6 id. 417; *Whitlick v. Kane*, post. 206; *McIntyre v. Humphries*, 1 Hoff. Ch. 31. Connecticut, *Washburn v. Merrills*, 1 Day, 139; *Reading v. Weston*, 8 Conn. 117, 120, 121, 122; *Dean v. Dean*, 6 id. 285. Tennessee, *Brown v. Wright*, 4 Yerg. 57. Ohio, *Miami Exporting Co. v. U. S. Bank*, 1 Wright, 249. In Kentucky, *Mercer v. Blair*, Lit. Sel. Ca. 412; *Thompson v. Patton*, 5 Lit. R. 74; *Lewis v. Roberts*, 3 Munroe, 409; *Murphy v. Trigg*, 1 id. 72. South Carolina, *Irby v. Little's Adm'r*, 4 Des. Eq. R. 422; *Todd v. Rivers' Ex'rs*, 1 id. 155; *Stinson v. McKeown*, 1 Hill S. C. 387. Virginia, *Ross v. Norvell*, 1 Wash. 14; *King v. Newman*, 2 Mumf. 40. North Carolina, *Streator v. Jones*, 3 Hawks. 423; 1 Murph. 449; *Dickenson v. Dickenson*, 2 id. 279; S. C. 1 N. Car. Law Rep. 262; *Jackson v. Blount*, 2 Dev. Eq. R. 555. Maryland, *Watkins v. Stockell's Lessee*, 6 Har. & J. 435; *Wesley v. Thomas*, id. 24; *Jones v. Leiby*, 5 id. 372. Alabama, *Hudson v. Isbell*, 5 Stew. & P. 67; *English v. Lane*, 1 Port. 328. Indiana, *Aborn v. Bennett*, 2 Blackf. 101. Pennsylvania, *Wharf v. Howell*, 5 Binn. 499; *Thompson v. While*, 1 Dall. 426, 427.

In New York it was decided, contrary to the doctrine which prevails elsewhere, that a deed or conveyance of personal property, apparently absolute on its face, may, at law, be shown by parol evidence, to be intended as a mortgage; not only between the parties, but even in favor of one party against a stranger, if the latter has not acted on the instrument, under the opinion that it is a deed, &c., as it purports to be. *Wallon v. Cronly's Adms.*, 14 Wen. 63; *Gilchrist v. Cunningham*, 8 id. 641; *Ring v. Franklin*, 2 Hall's N. Y. S. C. 1. But see per Nelson, J., in *Patchen v. Pierce*, 12 Wen. 61, 64,

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v. *Henry*, 2 Cowen, 324; *Ross v. Newell*, 1 Wash. R. 19.) Of the various questions raised by the counsel on the argument, I consider it necessary to examine a few particularly.

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*It is insisted by the appellant's counsel, that the assignment to the defendants gave no authority to them to foreclose the mortgage under the statute, or to give a conveyance on the sale which would bar his equitable right to redeem the lands in the hands of the purchaser. On this question I perfectly agree with the learned judge whose decree is appealed from. It was undoubtedly the intention of the parties that the defendants should have the right to foreclose and sell the mortgaged premises under the statute, for the purpose of barring the equity of redemption which existed in Frear and Hallowell, if they thought proper to pursue that course, instead of resorting to a court of equity.

The assignment was a mortgage of the power of sale, as

who seems to have thought that such proof was proper in equity only, and upon the assumption of fraud in the grantee, &c. This opinion was sustained by the Court of Errors in *Webb v. Rice*, 6 Hill, 219, and followed by the Supreme Court in *Bishop v. Bishop*, 4 Barb. S. C. R. 138. These decisions overrule all previous ones, and assimilate the rule in New York to that in England, and to most of the other states. As equity powers are now vested in courts of law in this state, and the Court of Chancery abolished, the powers incident to both may be exercised by the Supreme Court, according to circumstances, as in Pennsylvania. Whether this will give to the Pennsylvania decisions on this subject greater weight in this state remains to be seen. Heretofore the Pennsylvania decisions were, as Judge Cowen remarks, (2 Cowen & Hill's notes to Phil. Ev. 578,) not always safe guides on the subject of oral evidence, in respect to written instruments, when the inquiry is simply as to the rule *at law*. In the main, they agree with the decisions in equity; but to one accustomed to see the distinction between Chancery and strict legal powers preserved in some way, they require to be read and used with more than ordinary caution, from the fact, that while the proceedings present all the external appearance of a suit at law, the judgment, in many instances, involves principles peculiar to a court of equity. Thus, judgment will sometimes be rendered for the plaintiff in an action of ejectment, when a Chancellor would enforce a performance for an agreement of the land, or decree a conveyance.

well as a mortgage of the debt. The authority to execute the power was vested in the defendants by the mere act of assigning the legal interest in the mortgage. It always passes with the legal estate and debt, unless there are some words of restriction. If the defendants, in the fair execution of the power, had sold and conveyed the premises to a stranger for one half the amount of their debt, Slee would have been bound to pay them the balance, and would have had no claim to redeem the mortgaged premises from such purchaser. He must have understood that the defendants had a right to foreclose under the statute. The premises were advertised and sold with his full knowledge of the facts, and he made no objection that they were not authorized thus to proceed.

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The defendants, being the holders of the legal estate, if they sold and conveyed the equity of redemption of Frear and Hallowell to a third person under the statute, it necessarily follows that the legal title would also pass with it by the conveyance to the purchaser, and the whole estate which existed in Frear and Hallowell, previous to the giving of the mortgage, would again become united in such purchaser.

The same effect would be produced by a foreclosure of Frear and Hallowell's equity of redemption by a sale under a decree of this court, to which Slee was not made a party. A stranger purchasing under the decree, would unite the legal estate which is in the defendants with the equity of *redemption of Frear and Hallowell sold under the decree, and thus acquire the whole estate which existed in the mortgagors previous to the giving of their mortgage. In either case, Slee's claim upon the land would be divested by the sale, and the purchaser would hold it clear of all incumbrance. In neither case, however, would there be any foreclosure of the second mortgage which was created by the assignment. That would still be open to redemption by him; but his equity of redemption would then attach itself to the money for which the land was sold,

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instead of the land itself. But the effect of a sale either under the statute, or under such a decree, where the mortgagees of the bond and mortgage became themselves the purchasers, is entirely different. In that case, they only purchase the equity of redemption which existed in the original mortgagors, and the equity of redemption of the assignor still continues to attach itself to the legal estate, which remains unchanged in the purchasers, except that it is discharged of the equity of redemption of the original mortgagors, which, by the foreclosure, becomes merged in the legal estate. Thus, in *Jackson v. Colden*, (4 Cowen, 266,) under a statute foreclosure, where the holder of the legal estate or mortgagee himself became the purchaser of the equity of redemption, it was held that no deed was necessary to make his title to the premises perfect.

In this case, the equity of redemption of Frear and Hallowell was all that was or could be foreclosed by the sale under the power contained in the mortgage. That equity of redemption being purchased in by the defendants, the legal estate was in their hands, and Slee's equitable claim thereon remained untouched by that foreclosure. And it makes no difference, that the purchase of Frear and Hallowell's equity of redemption was made through the intervention of a third person; for by the operation of a resulting trust, the defendants never have been divested of the legal estate. No interest or estate whatever vested in Gen. Tallmadge, even for an instant. The plaintiff's equity of redemption was therefore never separated from the legal estate, which has remained untouched in the hands of the defendants ever since the assignment of the mortgage to them in August, 1819. But even if the legal effect of this purchase by the defendant's attorney were otherwise, this court would never permit such a circumstance, whether the same was accidental or intentional, to defeat the natural and equitable effect of a purchase by the defendants of that outstanding equity of Frear and Hallowell.

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In this view of the case, it becomes necessary for me to

examine many questions which have been raised, and particularly the one as to the admissibility of the evidence of Gen. Tallmadge respecting the agreement made a short time previous to the sale. The parol agreement made by him on behalf of the defendants, at that time, with the exception of the promise on his part to bid to the amount of their debt, if necessary, was precisely what I have found to be the legal effect of the assignment and foreclosure, and the rights of the respective parties, if that agreement had not been made.

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Again, the purchase of Frear and Hallowell's equity of redemption accrued to the benefit of Slee on the well known principle of equity, that where the mortgagee has gotten a refusal of a lease, or obtained any other advantage, in consequence of his situation as such mortgagee, the mortgagor coming to redeem is entitled to the benefit thereof.

The assignment of the bond and mortgage, being a subsisting mortgage, and the appellant's equity of redemption not being divested by the statute foreclosure, the question of waiver on account of the lapse of time, does not arise. This assignment by way of mortgage bears no analogy to a pledge of stocks or of personal property, for the purpose of securing a debt. The original mortgage was a specific lien on the land, and the assignment carried even the legal estate itself to the defendants. It must, therefore, be governed by those rules which are applicable to other mortgages of a legal or equitable interest in real estate. This was so considered by this court and the Court of Errors in the case of *Clark v. Henry*, before referred to. In such cases twenty years at least is required to bar the equity of redemption.

Law and justice both concur in this case in enabling me to declare, that Slee's equity of redemption in the premises is neither barred by the sale under the statute nor by the lapse of time; and the decree of the circuit judge dismissing the complainant's bill is therefore erroneous, and must be reversed.

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As the defendants admit in their answer, that they have been in possession of the premises by themselves or their tenants ever since the sale on the 10th of November, 1817, they must account for the rents and profits which they have or might have received. But under the peculiar circumstances of this case, I think they are entitled to an allowance for the insurance which was *bona fide* effected by them on the property, previous to Slee's application to them to redeem in January, 1825, and for all sums expended for taxes or repairs of the premises. They are also entitled to the costs of foreclosing the equity of redemption of Frear and Hallowell.

As to the costs, the general rule is, that on a bill to redeem, the plaintiff pays costs to the mortgagee, although he succeeds in obtaining the relief claimed. There are, however, exceptions to this rule; and where the mortgagee has set up an unconscientious defence, he has not only been refused his costs, but has been compelled to pay costs to the other party. (*Shuttleworth v. Lowther*, 7 Ves. Rep. 587. *Harvey v. Tebbut*, 2 Jac. & Walk. 197.) The case of *Henry v. Davis & Clarke*, (7 John. Ch. Rep. 40,) in this court, the decree in which case was afterwards affirmed in the Court of Errors, is one of this description.

In this case, the defendants have refused to permit the appellant to redeem, notwithstanding the directors were informed of the positive promise of their attorney and agent that he should have that liberty, and have compelled him to resort to this expensive litigation. I shall therefore allow him the costs of the proceedings in the equity court, and give to neither party any costs as against the other on the appeal in this court, or of the subsequent proceedings here.

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*ARNOUX v. STEINBRENNER AND OTHERS.

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Where an executor or administrator has commenced a wrong suit by mistake, or has ascertained that it would be useless to proceed in consequence of facts subsequently discovered, he will be permitted to discontinue without the payment of costs.

ARNOUX, together with Steinbrenner and De Groot, May 27th. was appointed executor and trustee of the will of Benoit Bonichon, deceased. The complainant alone accepted the executorship. Afterwards, being sick and wishing to be discharged from the trust under the will, he applied to his co-executors, and to the legatees and *cestui que* trust under the will, to consent to his discharge from the trust, and that the person principally interested in the property should be appointed trustee in his stead. They all consented except Steinbrenner, who refused because he did not intend to accept the trust, and would not therefore interfere. Arnoux then filed his bill in this court to be discharged, and Steinbrenner put in an answer, in which he declined having any thing to do with the trust, &c. It afterwards turned out that the estate was insolvent; and all the trust property was sold under executions issued in the lifetime of the testator.

I. Smith, on an affidavit of these facts, moved that the complainant have leave to dismiss his bill without costs.

D. Lord, jun., contra.

THE CHANCELLOR:—The English practice in cases of this kind appears to be, to require the complainant to bring his cause to a hearing, to get rid of the costs already accrued. (Anonymous, 1 Ves. jun. 140.)

The practice of the Supreme Court of this state is much more rational, and I am inclined to follow it in this court.

1828. The practice there is, to allow the executor or administrator to discontinue without costs, where he has brought a wrong action by mistake, or has ascertained that it would be useless to proceed, in consequence of facts subsequently discovered.[1] *(*Purdy v. Purdy*, 5 Cowen's Rep. 14. *Phoenix v. Hill*, 3 John. Rep. 247. *Morse v. McCoy*, 4 Cowen's Rep. 551.)

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The complainant has brought himself within the principle of the decisions of the Supreme Court, and must be permitted to dismiss his bill without costs.

Motion granted.

GERMOND v. GERMOND.

Where a bill was filed by a husband against his wife for a divorce, and a monthly allowance was ordered to be made to the wife by the husband, for alimony during the pendency of the suit, it was held, that she was entitled to this allowance up to the termination of the suit by a final decree, and not merely to the time of the trial which resulted in her favor.

Where the decree is in favor of the wife, she will be allowed against her husband her costs, and all the reasonable disbursements and expenses made in her defence.

May 31st.

THIS was a bill filed by the complainant against the defendant for a divorce *a vinculo matrimonii*, upon the ground of adultery. A feigned issue was awarded to try the charge of adultery, which was tried three times. The first trial resulted in favor of the complainant, the defendant being surprised by an attempt to prove an act of adultery on her part with a person not named in the bill. The two last trials terminated in her favor. Both the judges who presided at the two last trials certified that the verdicts rendered in favor of the defendant on those occasions were perfectly satisfactory to them. The last trial was in June,

[1] *Fowler v. Starr*, 3 Denio, 164; *How, admin'r v. Taylor*, 1 Wen. 84.

1825, at the Rensselaer circuit, before his honor the Chancellor, then the judge of the fourth circuit. In June, 1820, Chancellor Kent made an order, allowing the defendant \$25 per month for alimony during the pendency of the suit, and a further sum for the expenses of her defence. The monthly allowance was paid until June 8th, 1821. On the 11th of June, 1822, the Chancellor reduced the monthly allowance to \$10, a part of which allowance is paid, and the residue is in arrear.

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R. Emmet, for the defendant, cited *Loveden v. Loveden*, (1 Phil. R. 208;) *Miller v. Miller*, (6 John, Ch. R. 91.)

**J. L. Viele*, for the complainant, cited *Strange's Rep.* 647; 1 John. R. 281; 1 Burns' Eccl. Law, 508; *Strange*, 1214.

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THE CHANCELLOR:—This cause is now submitted for a final decree. The defendant asks that the bill against her may be dismissed with costs; that the moneys furnished by her friends for the expenses for her defence may be paid by the complainant; and that she may be paid the arrears of the alimony up to the time of the final decree, at the rate of \$25 per month, as allowed by the first order.

The complainant insists he ought not to pay any more for costs and expenses, and that the alimony in arrear ought not now to be paid; at all events, only to the time of the last trial, and at the rate of \$10 per month, as fixed by the last order.

In relation to the costs, and all reasonable expenses of her defence, I have no doubt as to the propriety of the allowance. The complainant has caused those expenses by an unjust prosecution against her; and she has drawn the amount from the liberality of her friends and relations, for the defence of her reputation. It is therefore perfectly equitable and just, that all those disbursements and expense should be paid by him.

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lin Bank.

As to the alimony, I think the defendant is entitled to it up to the termination of the suit by a final decree. She could not be required to return to the roof of her husband until this suit was fully ended. And it is his own neglect that he has not sooner brought it to a final hearing.

The case of *Loveden v. Loveden*, (1 Phil. Rep. 208,) shows it to be the practice of the ecclesiastical courts in England, in such cases, to allow alimony until the final determination of the suit. Under the circumstances of this case, I regret it is not in my power to allow to her the highest sum asked. But as she rested contented under the second order, without attempting to disturb it during the real litigation, the arrears of alimony at the rate of \$10 per month, is all that can be allowed.

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*IN THE MATTER OF THE PRESIDENT, DIRECTORS AND COMPANY OF THE FRANKLIN BANK IN THE CITY OF NEW YORK.

Samuel Leggett, a creditor of the president, directors and company of the Franklin Bank in the city of New York, having on the 29th of May last presented a petition to the court, under the act to prevent fraudulent bankruptcies by incorporated companies, &c., passed April 21st, 1825, setting forth that the company was insolvent, and praying for an injunction and the appointment of a receiver; and the court having directed a temporary injunction to issue, and that said company show why the prayer of the petition should not be granted; and the said company not having shown sufficient cause against the prayer of said petition, it was referred on motion of Mr. O. Hoffman, the counsel for the petitioner, to Thomas Bolton, Esq., one of the masters of this court, to receive from persons interested in the matter, nominations of proper persons to be appointed receiver, and to report to the court the names of the persons so nominated and their respective fitness, and also the names and sufficiency of the persons proposed as sureties; and the said Master having made his report as directed, his honor, the Chancellor, made the following order.

June 2d.

SAMUEL LEGGETT, of the city of New York, a creditor of the president, directors and company of the Franklin

bank in the city of New York, having on the 29th day of May, 1828, presented a petition to this court, in pursuance of the provisions of the act entitled, "An act to prevent fraudulent bankruptcies by incorporated companies, to facilitate proceeding against them and for other purposes," showing among other things, that the said company was insolvent, and setting forth the particular facts and circumstances of the case; and praying that an injunction might be issued by this court, to restrain the said company and its officers from exercising any of the privileges or franchises granted by the act incorporating the said company, or by any other act; and from collecting or receiving any debts, and from paying out, or in any way transferring any of the moneys or effects of the said company until this court should otherwise order; and that a receiver of the property, moneys and effects of the said company might be appointed, and the said property, money and effects of the said company distributed among the fair and honest creditors thereof; whereupon, this court directed a temporary injunction to issue, and that the said *president, directors and company show cause before the Chancellor, at the City Hall of the city of New York, on the 31st day of May now last past, at ten o'clock in the forenoon, why the prayer of the said petition should not be granted; and that copies of the said petition and of the said order to show cause, be forthwith served on the president or cashier of the said company, and on the Attorney-General of this state; and which said copies were thereupon duly served as directed by this court; whereupon, the said incorporated company, by Peter A. Jay, Esq., their solicitor, appeared before the Chancellor at the time and place last aforesaid, and did not deny the insolvency of the said company, or show any sufficient cause why the prayer of the petitioner should not be granted: and thereupon, on motion of Mr. Ogden Hoffman, solicitor for the petitioner, it was further ordered, that it be referred to Thomas Bolton, Esq., one of the masters of this court, to receive from any person or persons interested in this

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1838. matter, nominations of proper persons to be appointed receiver of the property, moneys and effects of the president, directors and company of the Franklin Bank in the city of New York, and to report to this court the names of the persons so nominated, and their respective fitness for the said appointment. And it was further ordered, that the said master also report the names of the sureties who might be proposed for the said persons respectively, and as to the fitness and sufficiency of the said proposed sureties to give bond with the person who might be appointed receiver as aforesaid, in the sum of fifty thousand dollars. And the said master was thereby directed to send to this court his report in this matter on Monday next, (and now last past.) And the said master having, in pursuance of the last-mentioned order, made a report to this court of the several persons named as receivers of the property, moneys and effects of the said company by the different parties in interest; by which report, among other things, it appears that James Kent, late Chancellor of the state of New York, has been nominated by the president, directors and company of the North River Bank in the city of New York, and by others; and that he is a fit and proper person for such receiver; and that *John Hone, senior, and Philip Hone are offered as his sureties for the faithful discharge of the said trust; and that they are and each of them is of sufficient ability and fully competent to become such sureties in the sum of fifty thousand dollars; and the truth of the several matters stated in the said petition being satisfactorily proved to this court, it is this day ordered, and this court, in pursuance of the directions of the statute in such case made and provided, doth order and direct, that an injunction do forthwith issue, agreeably to the prayer of the said petitioner, to restrain the said company and its officers, agents, solicitors, attorneys and servants, and each and every of them, from exercising any of the privileges or franchises granted by the act incorporating the said company, or by any other act; and from collecting or receiving any debts, and from paying out, or in any

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way transferring any of the moneys or effects of the said company, or any bond, bill, note, certificate of stock, or evidence of, or security for any debt due to the said company, or any other property, stock or choses in action, in which the said company have any right or interest either at law or in equity. And it is further ordered, that the same James Kent be, and he is hereby appointed receiver of the property, moneys and effects of the said company, on his filing with the assistant register of this court, a bond, executed by himself and by the said John Hone and Philip Hone to the people of the state of New York, in the penal sum of fifty thousand dollars jointly and severally; and conditioned for the faithful performance by the said James Kent of the trust reposed in him as such receiver; and that he shall obey such orders and directions as he may from time to time receive from this court in relation to the said trust; and that he shall account for and pay or deliver over as he may be directed by this court, all the moneys, property and effects of the said company which shall come to his hands as such receiver. And it is further ordered, that the president, director, cashier, clerks, tellers, attorneys, solicitors and other agents and servants of the said company, and each and every of them, under the direction of Murray Hoffman, Esq., one of the masters of this court, disclose and deliver over on oath to the said receiver all the moneys, property and effects *of the said company in their possession, or within their power, or under their control, or in the possession, within the power or under the control of any or either of them, and including the banking house and other real property, and the title deeds thereto, and all books, papers, memoranda and evidences of, or securities for, any debts due or owing to the said company, or in which the said company have any interest; and that they also assign over to the said receiver, under the direction of the said master, all public or private stock or stocks belonging to the said company, or hypothecated to or holden by the said company, or any officer or agent thereof,

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1828. for the security of any debt due to the said company ; and
In the Matter that they also disclose, assign and deliver over to the said
of the Franklin receiver on oath, and under the direction of the said master,
Bank. all moneys, effects, property, securities, stocks and evidences
of debt which have heretofore belonged to the said com-
pany, and have been assigned by the said company or any
officer or agent thereof, in contemplation of the insolvency
of the said company. And it is further ordered, that the
said receiver and master apply to this court from time to
time for direction in the premises, as they or either of
them may deem necessary. And it is further ordered,
that the said receiver deposit all notes and bills belong-
ing to the said company, payable in the city of New York,
and which are not yet due and payable in the bank in the
said city in which the moneys paid into this court for the
benefit of suitors thereof, are by law directed to be deposited,
to the end that such notes and bills may be demanded and
protested, if the same are not paid at the time when such
notes and bills respectively became due and payable.
And the said receiver is further directed not to extend the
time of payment of any debt or demand due or owing to
the said company, unless he shall be satisfied that such
debt or demand is unsafe, and unless additional security for
the payment thereof shall be given, in which case he is
authorized to extend the time of payment not exceeding six
months, on receiving sufficient security for the payment
thereof. And the said receiver is directed to proceed and col-
lect without delay, all debts due and owing to the said com-
pany, except in those cases where *it shall become necessary
to postpone the payment, and on obtaining sufficient security
as aforesaid, but that he be not required to put any demand
in suit where there is not a reasonable probability that suffi-
cient will be collected to pay the costs of suit ; and that the
said receiver be authorized to compound any debt due from
insolvent debtors in such manner as he shall deem for the
interest of the stockholders and creditors of the said com-
pany ; and that the said receiver be authorized to employ

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such clerks, solicitors, attorneys and counsel, and one or more clerks, at such reasonable compensation as he shall think proper, to aid him in the discharge of the duties of the said trust. And it is further ordered, that as often as the moneys in the hands of the said receiver amount to the sum of five thousand dollars, and oftener if he shall think necessary, he shall vest the same in the public stocks of this state or of the United States, in the name of the assistant register of this court, and deliver the scrip taken therefor to such assistant register, retaining, however, at all times, in the hands of the said receiver, such sum of money as he may deem necessary for the current expenses of executing the said trust, not exceeding one thousand dollars. And it is further ordered that the said receiver dispose of all the property and stocks belonging to the said company at public auction, at such times, and on such reasonable notice in the public papers of the city of New York, as he shall deem proper. And it is further ordered that the said receiver, with the least possible delay, make a cursory examination into the affairs and debts of the said company, and give information to the creditors of the said company by a notice to be inserted in one or more of the public papers of the said city, what, in his opinion, is the probable proportion of their debts, which the creditors of the said company may expect to receive from the property and effects of the said company. And it is further ordered, that the said receiver report to this court at the next term thereof in the city of New York, a full and perfect statement of the affairs of the said company, and of the amount due therefrom, and the amount of the proceeds of the property and effects of the said company, the debts due to the bank and uncollected at that time, the names of the *debtors, and the reasons why the same have not or cannot be collected; and that the said receiver give public notice in the paper printed by the printer to this state, and in the several public newspapers printed in the city of New York daily, and which circulate in the country, to the creditors of the said company, to pre-

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sent their claims against the said company to the said receiver, on or before the first of October next, to the end that the claims of the said creditors may be examined and ascertained; and that a division and distribution of the proceeds of the property and effects of the said company may be made among such creditors, agreeably to the statute in such case made and provided.

THE AMERICAN INSURANCE COMPANY v. FISK.

Wherever the remedy at law is doubtful and difficult, a court of chancery has jurisdiction.[1]

The act of Congress of March 3d, 1823, does not give exclusive jurisdiction of salvage and admiralty causes to the superior courts of the territory of Florida, organized by that act; and an act of the legislature of that territory, creating a wrecker's court, is valid.

Where such court in making an award, made an order not within their jurisdiction, it was held that this excess of jurisdiction only rendered the award void *pro tanto*.

A *bona fide* purchaser of property at a judicial sale, under the order of a court having jurisdiction of the subject matter is always protected, where the proceedings are only voidable, not void.

And courts ought to be liberal in sustaining the regularity of such sales, where there exists no doubt as to the fairness and official nature of the transaction.

The court are likewise protected, whose proceedings have been irregular, where they have jurisdiction of the subject matter.

May 29th.

In February, 1825, the ship Point a' Petre of Bordeaux, laden with cotton and nails, was lost on Carey's Fort reef, off the coast of Florida. Of the cotton on board, 536 bales were saved from the wreck by other vessels, and carried into Key West, where it was sold under an award of a wrecker's court, organized at that place; and 76 per cent. of the proceeds was awarded to the salvors. Fisk is a *bona fide* purchaser of 140 bales of cotton thus sold.

[1] *Whitlock v. Duffield*, 2 Edw. Ch. 366.

**J. Duer* and *G. Griffin*, for the complainants:—The legislative counsel of Florida had no power to pass the law creating a wrecker's court. That law was void, because it did not provide for an appeal from the wrecker's court; and did not give the court any authority to order a sale of the property. An inferior court can take no power by inference. (*Jones and Crawford v. Reed*, 1 John. Cas. 20. *Wells v. Newkirk*, 1 John. Cas. 228.) The court was not constituted agreeably to the provisions of the territorial law. It does not appear that the owner selected two jurors. It should affirmatively appear the court had jurisdiction. (*Entick v. Carrington*, 2 Wil. 282. *Stanyon v. Davis*, 6 Mod. 224. *Lord Covingsby Case*, 9 Mod. 95. *Kemp v. Kennedy*, 5 Cranch, 179. John. Dig. title, Justices of the Peace and Jurisdiction.

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The award was invalid on its face. It does not contain a specification of the property as required by the territorial law. This specification is material, to determine what salvage should be allowed, and in what penalty to give a bond in case of an appeal. It does not appear the property was within the jurisdiction of the court at the time the award was made. The wrecker's court exceed their jurisdiction in decreeing the sale of the property which might afterwards be saved from the wreck. The territorial law was not warranted by the act of Congress of March 3, 1823, which was the constitution of the territory. The act of Congress of February 1, 1826, declared the territorial act, creating the wrecker's court, null and void.

R. Sedgwick and *Sullivan*, for the defendant:—The complainants have no remedy in Chancery. Their remedy is at law; they can bring trover. (*Selden v. Hickock*, 2 Caines, 166; *Jackson v. Anderson*, 4 Taun. 24. 1 John. 471. *Heath v. Hubbard*, 4 East, 121. *Bloxam and others v. Hubbard*, 5 East, 407. 1 Ves. jun. 416.) The term inferior court does not necessarily imply there ought to be an appeal. The act of Congress of 6th May, 1824, gives an appeal to

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the Superior Court of Florida. From the expression *in the record, that the jury were summoned according to the law, it may be implied that the owners selected two of the jurors. The specification of the property in the award was sufficient. If not, the complainants should have appealed. The regularity of the proceedings cannot be questioned collaterally, if the wrecker's court had jurisdiction. (*Jones and Crawford v. Reed*, 1 John. Cas. 20.) The master of the vessel, who was the agent of the insurers, assented to the award. This assent binds the insurers, even if the wrecker's court had no jurisdiction. The master, as the agent of the insurers, had a right to sell the property. (*U. S. Insurance Co. v. Robinson*, 2 Caines, 182. *U. S. Ins. Co. v. Scott and Seaman*, 1 John. 111. 1 John. Cas. 378. *Coolidge and another v. The Glou. Marine Ins. Co.*, 15 Mass. Rep. 346.)

The Supreme Court of the United States have decided that the territorial act of Florida was constitutional.

THE CHANCELLOR :—An objection is made to the jurisdiction of this court, on the ground that the complainant's remedy is by an action of trover, in a court of law. The accidental obliteration of the marks upon the cotton, which rendered it impossible to ascertain to which of the various owners of the cargo the part saved belonged, together with the complicated rights of the different parties in interest, made the plaintiff's remedy at law at least doubtful, and certainly very difficult. These alone would be sufficient grounds to sustain the jurisdiction of this court. (*Weymouth v. Boger*, 1 Ves. jun. 416, and per Spencer, J., in *Wrathbone v. Warren*, 10 John. Rep. 595.) This case, therefore, turns entirely upon the validity of the sale under the proceedings in the wrecker's court at Key West.

There is nothing in the objection that a part of the property was not within the jurisdiction of the territory of Florida, for it is expressly admitted in the case, that 140 bales of cotton in controversy in this suit is part of the 586

saved from the wreck, and carried into Key West, before the proceedings in the wrecker's court took place. Besides, the act of Congress of 1826, concerning wreckers and wrecked *property, expressly recognizes all the keys and shoals off the coast of Florida as belonging to the United States, and as being within the territorial jurisdiction of Florida. The only question which could raise a doubt in my mind as to the validity of the territorial act of Florida, under which the wrecker's court was organized, is that which relates to the exclusive jurisdiction supposed to be given by the acts of Congress to the superior courts of that territory.

The complainants in this cause filed their bill in the district court of the United States for the South Carolina district, for another parcel of the cotton saved from the wreck of the Point a' Petre, and the same defence was set up as in this case. That court decided against the validity of the sale under the proceedings of the court of Key West. The decision was reversed on appeal to the Circuit Court, and the property was restored to Canter, the claimant. From this last decision, the complainant appealed to the Supreme Court of the United States, and at the last term of that court it was decided that the act of the territorial legislature, erecting the court by whose decree the cargo of the Point a' Petre was sold, was not inconsistent with the constitution and laws of the United States, and was valid, and that the sale made in pursuance of the award of the wrecker's court, changed the property; and the decree of the Circuit Court, awarding restitution of the property to Canter, was affirmed with costs. This decision disposes of the objection, that the act of Congress of March 8d, 1823, which has been very properly considered by the counsel for the complainants as the constitution of the territory, gave exclusive jurisdiction of salvage and admiralty causes to the superior courts of the territory organized by that act. (*The American Insurance Company et al. v. Canter*, 1 Peter's R. 511.) This decision, upon a question as to the construction of an act of

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Congress, and in favor of a right claimed under the constitution and laws of the United States, is binding and conclusive, it being the decision of the court of *dernier* resort on such questions; and this court is not now at liberty to question the correctness of the construction put upon the act of Congress by the constitutional tribunal, whatever its opinion might have been, if that *decision had not been made.[1] It also disposes of the objections that the territorial law itself was void, not having provided for any appeal from the wrecker's court, and that there was no authority given to the court to order a sale of the property.

It was suggested on the argument, that the territorial law was not before the Supreme Court of the United States, and therefore these two last questions could not have been examined and decided there. If such had been the case, I should have no hesitation in declaring both of these objections untenable; but as the suggestions of the counsel are not supported by the facts before me, I consider it unnecessary to take up time in discussing these questions. I have looked into the opinion of Judge Lee, in the District Court, and it is evident from that opinion that he had the territorial act before him, and had particularly examined its provisions. And Chief Justice Marshall, in his opinion, refers to the act by its date and provisions, and says, in express terms, that it is inserted in the record, and that it purports to give the power which has been exercised. In addition to this, I have made inquiry as to the fact of one of the judges of that court. There cannot, therefore be any doubt that the territorial act was before them, and that their decision was made in direct reference to its provisions.

Another objection is, that the award does not show that two of the jurors were named by the representative of the owners, agreeably to the third section of the territorial act. It cannot be necessary to inquire whether this may not be implied from the expression in the record, that the jury

[1] *Hicks v. Hotchkiss*, 7 John. Ch. 297.

were summoned "in conformity to the wrecking law of the territory," because, in the case agreed upon by the parties in this suit, it is admitted that the notice was given and the jury summoned as directed by the act, and pursuant to all the forms thereby prescribed. The next objection is to the award itself. There can be no doubt, from the concluding sentence, that it was the intention of the jury, that any other portion of the cotton and nails which might be saved from the wreck and brought into Key West, before the day of sale, should also be disposed of at public auction. The wreck being *within the territorial limits of Florida, I am not prepared to say they had not jurisdiction to order that sale. Salvage was awarded only upon that part which was actually brought in, and if the residue was sold, the master, as representing the interest of all concerned, would have been entitled to the proceeds thereof. At all events, it was only an excess of jurisdiction as to that which most probably never was saved from the wreck, and therefore it could only render the award void *pro tanto*. (Per Woodworth, J., 5 Cowen, 737.)

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The last objection which I shall consider is one which appears to be left untouched by the decision of the Supreme Court of the United States, as from the facts before that court it could not arise. The 4th section of the territorial act directs the jury to "make up an award in writing, setting forth a specification of the property, their opinion of the mode whereby the property ought to be disposed of for the benefit of those interested, and the quantum of salvage to be allowed to the salvors," &c. The award itself is now before me, in connection with the rest of the proceedings in the wrecking court.

It is contended by the complainant's counsel, that it contains no specification of the property as required by the territorial act; that in consequence thereof, the proceedings of the court were void, and that the sale to the defendant Fisk, under the order of the court, did not change the property. In examining the proceedings of the court at Key

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West, it ought to be borne in mind that Fisk was a *bona fide* purchaser of property at a judicial sale, under the order of a court having jurisdiction of the subject matter, and in a case where public policy, and the interest of owners and underwriters most strongly require that every reasonable encouragement should be holden out to purchasers of that description, in order to prevent a sacrifice of the property. It therefore becomes the duty of this court to sustain the proceedings of the tribunal under whose decision the sale to Fisk took place, so far as that tribunal kept within the limits of its jurisdiction. I have also the authority of a distinguished judge, who now occupies a seat upon the bench of the highest court in the Union, for saying, that the presumptions ought to be liberal in *favor of the regularity and competency of such sales, where no doubt is raised as to the fairness and official nature of the transaction. (4 John. R. 41.) The award of the jury, which forms a part of the record of the proceedings at Key West, recites the name of the ship and her master, where from, whence bound, a particular description of her cargo, 891 bales of cotton and 20 casks of nails, the day and place when and where she was stranded, and that a part of the cotton had been saved and brought into Key West by Captain Brown of the schooner Florida, and Captain Johnson of the schooner Jane. It then awards 76 per cent. to the salvors on the amount of property so saved. It appears by the record of the proceedings there, and by the pleadings in this cause, that the cotton had lain in the water, that the deck of the vessel had been burned off before it could be gotten out, and that the original marks, &c., which distinguished the different parcels, were all obliterated. No further specification could therefore be given, unless the jury had overhauled the cotton and counted the bales, or weighed that which had been saved. I am inclined to think the award was in this respect so far a compliance with the territorial law, that it would not have been reversed on appeal for defect of form. But at all events, it

was not such a defect as would make the proceedings void. They were at most only voidable, and, in such cases, a bona fide purchaser under a judicial sale is always protected; [1] and the judge himself, whose proceedings have been irregular, is also protected, where he had jurisdiction of the subject matter, if there has been no excess of jurisdiction. (*Warren v. Shed*, 10 John. R. 188; *Butler v. Potter*, 17 John. R. 145.) The result of this opinion is, that Fisk acquired a perfect right to the 140 bales of cotton under the sale at Key West. The complainant's bill must, therefore, be dismissed with costs.

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[1] A purchaser under a decree cannot be affected by error in the decree, as where sufficient notice to show cause has not been given, or where a decree has been made to sell lands, to satisfy judgment debts, without an account of the personal estate. A purchaser has a right to presume the court has taken the necessary steps to investigate the rights of the parties, and that on that investigation it has properly decided a sale. *Bennett v. Hamill*, 2 Sch. & Lef. 566. Nor can he be affected by constructive notice of circumstances of negligence on the part of the assignees conducting the sale. *Borell v. Dann*, 2 Hare, 446.

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v. FITCH AND ANOTHER.

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An injunction will lie to restrain trespasses in order to quiet the possession, or where there is danger of irreparable mischief, or the value of the inheritance is put in jeopardy.

A preliminary injunction before answer, rests in the discretion of the court, and ought not to be granted, unless the injury is pressing and the delay dangerous.

It will not be granted to restrain a party from running a steamboat, and landing their passengers at the dock of another.

Whether a court of equity have any jurisdiction in such a case? *Quære*.

There are many cases in which a complainant would be entitled to a perpetual injunction upon the hearing, where it would be improper to grant him a preliminary injunction.

THE bill in this cause stated that the complainants, since June 5th. 1824, have been and now are the owners and proprietors

1830. of certain real estate on Staten Island, on which they have
 N. Y. Printing made erections at great expense for manufacturing pur-
 and Dying poses, and of which they are in the actual and daily occu-
 Establishment pation and use, for the purposes contemplated in their act
 v. of incorporation ; that among the erections and improve-
 Fitch. ments connected with that real estate, is a dock and land-
 ing of great value and convenience to the complainants, in
 reference to their manufacturing business ; that the defend-
 ants, the one as the master and the other as the nominal
 owner of the steamboat Marco Bozzaris, carrying freight
 and passengers, have lately commenced the practice of
 stopping from day to day, and coming to with the said
 boat at the complainants' dock and landing, and of going
 upon the dock and fastening to the same, and discharging
 and taking in passengers and freight, without the consent
 and against the interest of the complainants, and that they
 continue the same from day to day in defiance of the com-
 plainants' rights ; that the defendants pretend the dock and
 landing are public, and that all persons have a right to
 make use of it ; whereas the complainants charge that it is
 their own exclusive property, and neither the defendants
 or the public have any right of way, or rightful privilege
 over or in relation to the same.

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*The bill prays for a perpetual injunction, to restrain the defendants from using the dock or landing, and for general relief.

A preliminary injunction has been allowed by the master, which the defendants apply to dissolve on the matter of the bill only.

D. Selden, for the defendants, cited *Storm v. Mann*, (14 John. Ch. R. 25 ;) *Jerome v. Ross*, (7 John. Ch. R. 321 ;) *Stevens v. Beedman*, (1 John. Ch. R. 318 ;) *Corporation of the City of New York v. Mapes and another*, (6 John. Ch. R. 46 ;) *Lord Tenham v. Herbert*, (2 Atk. 483 ;) *Eldridge v. Hill and another*, (2 John. Ch. R. 281 ;) *Livingston v. Same*, (6 John. Ch. R. 397.)

H. W. Warner, for the complainants, cited *Waters v. Taylor*, (2 Ves. & Beame, 299;) *Livingston v. Same*, (6 John. Ch. R. 498;) *Hill v. Thompson*, (3 Merrivale, 624;) *Gee v. Pritchard*, (2 Swans. 415.)

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THE CHANCELLOR:—Where a motion is made to dissolve the injunction on the matter of the bill only, agreeably to the 75th rule of this court, the case must be viewed in the same manner as if it were an original application for the injunction, and opposed by the defendants' counsel. If the complainants were now asking for this preliminary injunction, is this a case in which it would be proper for this court to grant their application? There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction *in limine*. The final injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the cause. On the contrary, the preliminary injunction before answer, is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing and the delay dangerous.[1] (*Ogden v. Kip*, 6 John. Ch. R. 60.) The case of *Waters v. Taylor*, (2 Ves. & Beame, 299,) relied upon by the complainants' counsel for the purpose of showing that an injunction will be granted to prevent a multiplicity of suits at *law, was a decision upon the hearing, and in a case of partnership.

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Whether the facts stated by the counsel on the argument, in relation to the controversy in this cause, would be sufficient to sustain the jurisdiction of this court, on the principle of quieting them in the enjoyment of their property, and preventing the necessity of a perpetual litigation, it is not necessary to decide at this time.

[1] *Floomfield v. Snowden*, 2 Paige, 355; *City of Rochester v. Curtiss*, 1 Clarke, 336; *Arthur v. Case*, post, 447; *Pilley v. Eastern Counties Railway*, 8 Sim. 483; *New York Printing Company v. Fitch*, 4 Paige, 127. See further, Am. Ch. Dig. by Waterman, tit. *Injunction*.

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It is sufficient for the decision of the question immediately before the court, that it does not appear that any serious damage or irreparable injury will take place, if the defendants continue to run their boat and land their passengers, as they have heretofore done, until the complainants' rights are admitted by the answer, or settled on the hearing. On the other hand, I can readily see that retaining the preliminary injunction may produce great injury to the defendants, and for which they would be entirely without remedy, if it should finally appear that they were only in the exercise of their legal rights.

The case of *Livingston v. Livingston*, (6 Johns. Ch. Rep. 497,) and the several cases there referred to, settle the principle that an injunction will lie to restrain trespasses, even where there is a legal remedy for the intrusion; but there must be something particular in the case, to sustain the jurisdiction of the court so as to bring the injury under the head of quieting the possession, or to make out a case of irreparable mischief; or the value of the inheritance must be put in jeopardy by the continuance of the trespass.

The case made by the complainants' bill, is not sufficient to justify the court in granting or retaining the preliminary injunction before answer, and it must therefore be dissolved.

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*WARD v. VAN BOKKELEN.

An injunction on coming in of the answer will not be dissolved, unless the defendants positively deny all the equity of the bill. A denial from information and belief is not sufficient.

Twenty years, by analogy to the statute of limitations, is the period allowed in Chancery for commencing proceedings to set aside conveyances of real estate on the ground of fraud.

Where the complainant suffered three years to elapse without compelling an answer from one of several defendants, and the other defendants in their answer charged collusion between the complainant and the defendant who

had not answered; it was held that under such circumstances, the fact that all the defendants had not answered, could not be urged as an objection to the dissolution of an injunction, unless the complainant denied upon affidavit, all collusion, and stated sufficient reasons for not compelling an answer from all the defendants.

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Slosson, on behalf of the defendants who had answered, June 6th. moved to dissolve the injunction granted in this cause, restraining the defendants from taking out of court certain moneys, which were the proceeds of certain premises sold under a mortgage, alleged in the bill to have been fraudulently given by one John Post to Mrs. Morris, under whom the defendants claimed. The complainant claimed under a judgment against John Post. The injunction also restrained the defendants from disposing of all that part of the real estate which had been conveyed by John Post to Mrs. Morris, and which was still held and possessed by the defendants. Mary Post, one of the defendants, had not answered. Mr. Slosson cited *Deypeyster v. Graves*, (2 Johns. Ch. R. 148.)

G. Griffin, contra, objected to the motion, that the answer did not positively deny the fraud charged in the bill, that swearing as to belief and information was insufficient. He contended, also, that the defendants should all answer before this motion could be made. He cited *Roberts v. Anderson*, (2 John. Ch. R. 202,) and Wyat's Pr. Reg. 284.

THE CHANCELLOR:—The answer in this case is put in by defendants, who probably knew nothing of the transaction charged in the bill to have been fraudulent. Their answer, of course, can only deny the equity of the bill, by information and belief. They cannot deny the facts stated therein upon any knowledge they possess. The answer, therefore, is not sufficient to authorize a dissolution of the injunction. *Roberts v. Anderson*, (2 John. Ch. R. 202.) Independent of the complainant's oath to the bill, the facts stated therein, and admitted by the answer, show a case of

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suspicion. The single circumstance, that the person against whom the decree of this court was obtained, conveyed a large estate to his mother in law, within a few days after the decree, and before it could be enrolled and enforced against the property, is sufficient to raise a doubt as to the validity and honesty of that transaction.[1]

If the conveyance was fraudulent, no period of time, short of twenty years, will prevent the persons intended to be defrauded thereby, from pursuing their remedy against the land in the hands of the fraudulent grantee, or her heirs or devisees. Twenty years is the shortest limitation of actions at law respecting real property in this state, and by analogy to the statute of limitations, that is the shortest period which can bar a proceeding in this court to set aside conveyances of real property, on the ground of fraud.[2]

In this case, it is no objection to the dissolution of the injunction, that Mary Post has not answered. The complainant has suffered nearly three years to elapse, without taking any steps to compel an answer from her, and it is suggested in the answer of the other defendants, that there is collusion between her and the complainant. Under such circumstances, if he wished to rely upon the objection that she had not answered, in opposing this motion to dissolve the injunction as to the other defendants, he should have produced an affidavit denying the collusion, and showing why he had not compelled her to answer. But for the

(1) *Apthorpe v. Comstock*, 1 Hop. 140; *Little v. Marsh*, 2 Iredell's Eq. 18; *Poor v. Carleton*, 3 Sumner, 70; *Norton v. Woods*, 5 Paige, 260; *Manchester v. Day*, 6 id. 295; *Everly v. Rice*, 3 Green. Ch. 553. See further Am. Ch. Dig by Waterman, tit. *Injunction*.

(2) Effect will be given to the statute of limitations in equity as well as in law. *Lewis v. Marshal*, 1 McLean, 16; *Lewis v. Marshal*, 5 Pet. 496; *Humbert v. Trinity Church*, 24 Wen. 587; *M'Crea v. Purmont*, 16 Wen. 460; *Thomas v. Harvie*, 10 Wheat. 146. But the statute of limitations is not always applicable to cases of equitable cognizance merely; *Attorney-General v. Purmont*, 5 Paige, 620; it is generally adopted; *Humbert v. Trinity Church*, *supra*; cases of fraud excepted: *Michoud v. Girod*, 4 How. U. S., 503; *Marks v. Pell*, 1 John. Ch. 594.

reasons before stated, the answer of the other defendants is not such a denial of the equity of the bill, as will authorize a dissolution of the injunction. The motion must therefore be refused, and the costs abide the event of the suit.

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McLaren
v.
Pennington.

In relation to the supplemental bill and second injunction, the question is not properly before the court on this motion; *but it may be proper to suggest, that the regular practice in such cases is that pursued in *Fanning v. Denham*, (4 John. Ch. R. 35.)

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McLAREN v. PENNINGTON AND OTHERS.

The privileges and franchises granted to a private corporation, are vested rights, and cannot be divested or altered, except with the consent of the corporation, or by a forfeiture declared by the proper tribunal.

A state cannot pass any law which alters or amends the charter of a private corporation, without the consent of such corporation.

But a law altering the remedy of one of the parties to a contract, is constitutional and valid.

Where, however, a state legislature reserves to itself in the very charter it grants to a private corporation, the right of altering, amending, or repealing the act of incorporation, a subsequent repeal of such act of incorporation will be valid and constitutional.

Such a reservation in the charter of a corporation, upon common law principles, would not be a condition repugnant to the grant, but a limitation of the grant.

And if such a reservation at common law would be repugnant to the grant, and therefore void, it is competent for a state legislature to alter this rule of the common law. And the reservation of such a power in a legislative grant would of itself change the law in relation to that particular grant.

Where a state legislature repealed an act of incorporation, containing a reservation of the right of repeal, it will not be presumed this right was improperly or unconscientiously exercised.

Where an act of incorporation is repealed, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees.

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McLaren
v.

Pennington.

A debtor to a bank, whose charter is repealed, has an equitable right to offset every demand which he had against the bank at the time of the repeal of its charter, but not demands which he afterwards purchased.[1]

Where there are difficulties in relation to an offset at law, relief will be granted to the party claiming the offset, in Chancery.

June 8th

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On the 20th of December, 1824, the legislature of New Jersey incorporated "The New Jersey Protection and Lombard Bank," with a capital of \$400,000, divided into shares of \$100 each. The complainant and five others were appointed commissioners to receive subscriptions; and in case an *excess was subscribed, to apportion the stock among the subscribers, in proportion to the amount of their several subscriptions. The corporation was authorized to loan money upon real estate, public stock, or personal property, to insure against loss or damage by fire or water, and to issue bills of credit, not exceeding its capital paid in. And it was also authorized to commence business as soon as two hundred thousand dollars of the capital was subscribed and paid in. By the seventeenth section of the act of incorporation, it was to continue in force for a term not exceeding twenty-one years. But it was therein expressly provided that it should be lawful for the legislature, at any time, to alter, amend, or repeal the same. By the last section, the act of incorporation and the franchises therein granted, were declared to be upon the express condition, that the sum of \$25,000 was paid to the treasurer of the state, as a consideration for the act of incorporation, within thirty days after the company should commence operations; which sum was to be appropriated to the school fund. Shortly after the passage of the act, subscription books were opened by the commissioners; and in March, 1825, the complainant and eight others were elected directors of

[1] Bills obtained by the solvent debtors of a bank, after it has stopped payment, though before a receiver has been appointed, are not receivable as a set-off against the bank. *Niagara Bank v. Roosevelt*, 9 Cow. 409. See also *Hazion v. Bishop*, 3 Wen. 13.

the institution. The complainant was chosen president, and Edward C. Priest was appointed cashier.

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The bank commenced operations on the first of June, 1825, and within thirty days thereafter obtained the receipt of the treasurer of the state for the \$25,000, required to be paid by the last section of the act of incorporation. The bank continued in operation until the 18th of November, 1825, when it stopped payment. At the time the complainant held 1,444 shares, being merely three-fourths of all the stock subscribed; and the bank held his stock notes, for \$114,400, payable to Edward C. Priest, cashier of the bank, and for the security thereof, 1,144 shares of his stock were pledged. On the 23d of November, in the same year, the legislature of New Jersey repealed the act of incorporation, and appointed the defendants, together with Caleb S. Riggs, who is since dead, trustees; and authorized them, or a majority of them, to demand, sue for, collect and receive, and take into *their possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books of account, securities for money, evidences of debts, and all property of every nature and description, belonging to the bank at the time of passing the repealing act; and to sell and convey all the personal estate of said corporation, and pay into the Court of Chancery the proceeds of the corporate property, debts and funds, to be disposed of equitably, under the order of the Chancellor, amongst the creditors of the corporation, after allowing to the trustees a reasonable compensation for their trouble. On the 10th of December, 1825, the legislature passed a supplementary act, with a preamble reciting that doubts had arisen, touching the powers and duties of the trustees, and that it was the intention of the repealing act to preserve uninjured and unimpaired, all the then existing rights and responsibilities, whether in favor of, or against the said bank; and then enacting and declaring, that the trustees were, and from the passing of the repealing act, should be deemed, and taken to have been vested as trustees for the

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creditors of the said bank, and the stockholders existing at the time of the passing of the act of repeal, with all the estate, real and personal, in law and equity, and with all the credits, rights in action, debts and demands whatsoever, lawfully belonging to, or vested in the said bank, at the time of the repeal of the charter. And the trustees, or the survivors of them, are authorized to institute suits in their own names, as "trustees of the creditors and stockholders of the New Jersey Protection and Lombard Bank," for any such debts or property, and to compound and settle debts and claims, and allow offsets, &c.

P. W. Radcliff and P. A. Jay, for the defendants:—The complainant is too late in his motion to amend his bill. He should have asked to amend, as soon as the defect was discovered. The stock subscribed by the complainant was a sufficient consideration for his stock notes. The failure of the bank, and the depreciation of this stock thereby, is no defence to an action upon these notes, either at law or in equity; and the complainant can interpose the same defence *to these notes as if he had been sued thereon by the directors of the bank.

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The stock was not apportioned in the manner required by the charter. The bank went into operation before the sum required was paid in. In fact there was an entire want of capital when the bank commenced business. When the bank stopped payment, the complainant held nearly three-fourths of the stock, for which he had given his note to the bank without security. These reasons were sufficient to authorize the legislature of New Jersey to repeal the charter, and appointed the defendants trustees to take possession of the effects of the bank. It was not necessary to assign these reasons upon the face of the act. The act repealing the charter was constitutional, as the right of repeal was reserved by the legislature of New Jersey in the act of incorporation. It was one of the conditions of the contract to which the stockholders acceded. The rule that a condition repugnant to a

grant is void, does not apply to a contract between a legislature and a citizen; as the legislature is omnipotent and can alter the law. Here the power of repeal was reserved. The exercise of this power does not, therefore, come within the clause of the U. S. constitution, prohibiting every law which will impair the obligation of contracts. The fact of the bank having paid a bonus to the state of New Jersey for its charter, did not take away the right of repeal. It is like the case of a tenant at will who has paid a consideration to his landlord, but is nevertheless liable to be ejected whenever the landlord thinks proper to determine the tenancy. The state of New Jersey had power to appoint trustees. This state authorizes the appointment of receivers. The legislature of New Jersey possessed the power of repealing this charter without any judicial investigation. Estates have been confiscated without trial. So have estates tail been abolished without trial. This court will presume the charter of this bank was violated before the legislature of New Jersey repealed it. The complainant cannot object that the legislature of N. J. have destroyed the stock, he being *particeps criminis*, having with others produced that state of things which caused the legislature of that state to *interfere thus summarily. The bill being for discovery merely, it may be dismissed without setting down the cause for argument. *Brandon v. Sands*, (2 Ves. jun. 514.)

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J. Tallmadge and D. B. Ogden, for the complainant:—The complainant is not too late in his application to amend his bill, by adding a prayer for general relief. (12 Ves. 48, 62, 64, 66; 15 Ves. 358.) The court will retain this cause. The complainant being lawfully here, this court ought not to send him back to a court of law. Where a court of chancery gains jurisdiction for one purpose, it may retain the bill generally. (*Rathbone v. Warren*, 10 John. 587; *King v. Baldwin*, 17 John. 384.) The complexity of circumstances in this case, will induce the court to retain jurisdiction of the cause. The complainant cannot avail him-

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self of his offset at law, which is there limited solely to the parties on the record. (*Wheeler v. Raymond*, 5 Cowen, 231; *Johnson v. Bride*, 6 Cowen, 698.) A mere agent being holder of a note may sue, and his right cannot be inquired into at law, unless he is the holder of the note by fraud. (*Pierson v. Crafts*, 12 John. 90; *Murray v. Judah*, 6 Cowen, 484.) Courts of law only look to the parties upon the record. (*Mauran v. Lamb*, 7 Cowen, 171; *Conroy v. Warren*, 3 John. Cas. 263; *Payne v. Eden*, 3 Cain. 213.) In this case, the bank having paid a consideration for its charter, it had vested rights which the legislature of N. J. could not defeat. (*Dartmouth College v. Woodward*, 4 Wheaton, 518.) No condition could be annexed inconsistent with the grant. *Bradley v. Peixoto*, 3 Ves. jun. 328; Co. Lit. 243; 2 D'Anver's Abr. 22; *Rosevelt v. Thurman*, 1 John. Ch. R. 220; *Jackson v. Shultz*, 18 John. 174.) Under the clause in the act of incorporation reserving the right of repeal, the legislature of N. J. had no power, for any special cause, to revoke the grant. If they had this power, it could only be exercised upon an inquiry by commissioners, or upon a judicial investigation, establishing the existence of such special cause. The appointment of trustee to take charge of the property and effects of the bank was void. (*Bank of Columbia v. Oakley*, 4 Wheaton, 236, 245; *Young v. Bank of Alexandria*, *4 Cranch, 395.) These cases make a distinction between corporate franchises and ministerial injunctions, which furnishes a clue to a true construction of this repealing clause. The act of repeal blighted the whole stock of the bank. The consideration of the complainant's notes consequently failed. When the corporation was dissolved, the debts due to and by it became extinguished. (*Edmonds v. Brown & Tillard*, 1 Lev. 237; Co. Litt. 13, b.; 1 Black. Com. 484; Kyd on Cor. 516.) Its personal property afterwards could only be held by right of occupancy. The act of N. J., appointing trustees, was an *ex post facto* law, as the act of incorporation had already provided that in case of a dissolution of the corporation, its officers should be the

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trustees. (Pow. Con. 445; *Wilmington v. Briscoe*, 8 Mod. R. 51.)

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THE CHANCELLOR:—If the act repealing the charter of the bank was unconstitutional, the defendants acquired no rights under that act, and the notes in controversy still belong to the corporation. It is proper, therefore, that that question should be first considered. It is a well settled principle of the common law, that the privileges and franchises granted to a private corporation become a right vested, which cannot be divested or altered, except by the consent of the corporation, by a forfeiture declared by the proper tribunal, or by act of parliament. In this country they can only be divested by one of the two first methods. Although the state legislatures have all the powers of the British parliament, where they are not positively restricted by the United States or state constitutions, the fundamental law of our free government has deprived them of the power of interfering with vested rights. In the case of *The Dartmouth College v. Woodward*, (4 Wheat. Rep. 518,) the Supreme Court of the United States decided, that the privileges and franchises granted to a private corporation became a contract executed, within the prohibitory clause of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts; and that a law altering the charter, in a material respect, is unconstitutional and void. Neither that case, nor *The Bank of Columbia v. Oakley*, (4 Wheat. Rep. 235,) recognize the distinction contended for by the complainant's counsel, between the franchises, and the administrative part of the charter. On the contrary, in the former case Judge Story says, "Unless a power be reserved for that purpose, the crown cannot, by virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the

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charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn and well settled doctrines of the common law." The decision of the court in *The Bank of Columbia v. Oakley*, was only an assertion of the equally well settled principle of constitutional law, that a state may pass a law materially altering the remedy of one of the parties to a contract, although it cannot pass a law impairing the obligation thereof, or changing the effect or nature of the contract, in the most unimportant particular.[1] (*Wilson v. Mason*, 1 Cranch's Rep. 44. *Fletcher v. Peck*, 6 Cranch, 87. *State of New Jersey v. Wilson*, 7 Cranch, 164. *Sturges v. Crowninshield*, 4 Wheat. 122. *Green v. Biddle*, 8 Wheat. 1.)

The validity of the act repealing the charter, must, therefore, depend upon the effect that is to be given to the seventeenth section of the original act of incorporation. This section, in terms, gives the legislature a right, at any time, to alter, amend or repeal the act of incorporation. But the counsel for the complainant contends that this section is repugnant to the grant of the franchises contained in the other parts of the act, and is therefore void. The common law principle, that a condition repugnant to the grant is void, has no application to this case. The seventeenth section is not a condition repugnant to the grant; it is only a limitation of the grant. Even in a common law conveyance, a power of revocation reserved to the grantor was valid. It is true, that by the statute of frauds, (1 Rev. Laws, 77, sec. 5,) all grants of land, with a power of revocation, are declared to be void as against *purchasers who purchase of the grantee before the power of revocation is executed. The object of this statute was to prevent the frauds which were practiced under such powers, at the common law; but even since this statute, the estate will be divested if the power of revocation is executed while the title

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[1] 2 Kent, 806, n.

remains in the grantee. If the rule of the common law were otherwise, it could not affect this case. The legislature of New Jersey were competent to alter any rule of the common law. They might, by law, declare that a power of revocation reserved to the grantor in a deed of feoffment should be valid, and that the executing the power should divest the estate granted; or that a general restriction against alienation should be good in a conveyance in fee. And if they could authorize other persons to insert such conditions in their contracts and grants, surely the legislature could annex such a power of revocation to their own grant. The reservation of such a power in a legislative grant, if it was contrary to the common law, would of itself change the law in relation to that particular grant; and the statute law of the grant itself would form the law of that case. It is not pretended that there is anything in the constitution of New Jersey, or of the United States, which prohibits the reservation of such a power in a legislative grant; on the contrary, the insolvent laws of the states have been sustained, on the principle that a general law of the state where the contract was made, and which was in force at the making of such contract, is to be taken as a part of the contract. (*Blanchard v. Russell*, 13 Mass. Rep. 16. *Mather v. Bush*, 16 John. Rep. 233. *Hicks v. Hotchkiss*, 7 John. Ch. Rep. 297. *Ogden v. Sanders*, 12 Wheat. Rep. 213.) And I apprehend there never would have been any doubt as to the validity of insolvent discharges, if the provisions of the insolvent laws have been actually incorporated into the contracts, as forming a part thereof. The power of repealing the bank charter was therefore legally and constitutionally reserved to the legislature of New Jersey, and this court will not presume it has been improperly or unconscientiously exercised.

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If it were necessary for the defendants to show that the legislature had good cause for repealing the charter, I think *there is sufficient in the bill and answer in this case,

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to show it was not only the right, but the duty of the legislature to put an end to the banking powers of this corporation as soon as possible.

By the act of incorporation the capital stock of the bank was to be \$400,000, divided into 4,000 shares of \$100 each; and if any excess was subscribed, the commissioners were to apportion it among the several subscribers. But the corporation were authorized to commence operations when \$200,000 was subscribed and paid in. It does not appear, from the bill and answer, how much was subscribed, or whether there was any excess over the 4,000 shares. But it does appear, that of the 217 persons who were subscribers, 187 got no stock; and the commissioners, instead of dividing the 4,000 shares among the subscribers, as directed by the act, limited the number of shares to 2,000, which they were not authorized to do by the act of incorporation. Of that 2,000 the complainant took 800, and the other five commissioners 200 each, and they distributed the remaining 200 among 24 other persons. Having thus secured the stock, the complainant and four of his associate commissioners elected themselves directors, in conjunction with four other persons, and appointed the complainant president. The directors gave him \$80,000 for his secret services in procuring the charter. With this he was enabled to pay for 300 shares of his stock, which he afterwards pledged to the commissioners of the school fund to secure his bond for the bonus, which he substituted in lieu of the money received from the bank for that purpose. He alleges in his bill, that he bought in 644 shares of the stock subscribed by other persons; for which, and the remaining 500 shares of his original subscription, he gave his notes to the bank without security, for \$114,400, and pledged the stock for the payment. By these operations, if all the residue of the stock subscribed was paid in, the capital could not exceed \$80,600. If, as was most probably the case, the other directors got discounts in the same proportion, there was not only an entire want of capi-

tal, but the institution was insolvent to the extent of \$25,000 when it commenced operations. And as might well have *been anticipated, by those who knew the situation of the institution, the country was flooded with bills of no value, and the bank stopped payment in less than six months after it went into operation. The legislature, under such circumstances, would have done injustice to the community if it had not immediately put a stop to this abuse of the privileges granted by the act of incorporation.

What then was the effect of this repeal, upon the debts, credits and property of this corporation? The effect, at common law, of the dissolution of a corporation, it is not necessary to consider in this case, because the common law is changed by the statute of New Jersey passed in January, 1817, which was read by the complainant's counsel on the argument. That statute provides, that on the dissolution of a corporation of this description, the directors then in office shall be trustees for the stockholders and creditors; and all the property and rights of the corporation are transferred to such trustees. Such would have been the effect of a simple repeal of the charter of this bank. But the same power which had a right to change the common law, had also a perfect right to change the trustees provided for by the act of 1817. This was done in the repealing act. There never was an instant of time when the creditors of the bank were released from the obligation of their contracts, or when any rights vested in the directors as trustees.

The defendants in this case have all the rights which were vested in the corporation at the moment of its dissolution; and the complainant can make any defence to an action brought against him by the trustees which he might have made against a suit brought by the corporation, had it continued in existence. They have, therefore, no right to recover against him as the drawer of the bill of exchange on Thomas B. Woodward, or as indorser of the notes of Daniel Mallery, or Abraham Collins & Co.; in

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the drawing and indorsing of which he was acting only as an officer of the corporation. If he has destroyed the collateral security which was taken for the Mallery note, the remedy against him cannot be by action on the note, as indorser. Whether the notes for \$114,400 were given in pursuance of a direct *agreement between McLaren and his co-directors, in payment of his stock, as stated in the bill, or by way of discounts, to enable him to withdraw from the bank the capital paid in, as alleged in the answer, cannot materially vary the rights of the parties. The one would be a direct, and the other an indirect fraud upon the act of incorporation and upon the other stockholders of the bank, as well as upon those who might become creditors of the institution under the belief that the \$200,000 capital required to be paid in before the bank commenced operations had actually been paid. Whatever shift or device was resorted to for the purpose of evading the provisions of the act of incorporation, a court of chancery will never permit it to be set up to defeat a recovery on those notes for the benefit of the creditors of the bank, who are entitled to be first paid out of the trust property. In either state of facts, the consideration for these notes has not failed. If there is any surplus after paying the debts of the bank, the complainant as a stockholder will be entitled to his share thereof, under the provisions of the repealing act and the act supplementary thereto. That surplus cannot be ascertained until the whole of the debts and property of the bank are collected and turned into money, and deposited in the Court of Chancery of New Jersey for distribution. It follows, from what has been said, that the complainant, so far as respects these stock notes, cannot be entitled to the only relief which is asked for in his bill. In relation to his set-off, there can be no doubt of his equitable right to be allowed for any demand which he had against the bank at the time of the repeal of its charter. If he has purchased up bills of the bank, or procured the assignment of other claims, since that time,

he cannot avail himself of them as a set-off; but must come in for his distributive share with the rest of the creditors.

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In consequence of the difficulties in relation to a set-off at law, since the decision of the Supreme Court in *Wheeler v. Raymond*, (5 Cowen's Rep. 231,) it is probable the complainant, on a bill properly framed for that purpose, might have been entitled to the aid of this court in allowing his set-off against the notes, on account of the doubt and difficulties *of such a defence at law. When he sought the aid of a court of chancery for this purpose, he should have stated more particularly the nature and amount of those claims for set-off, and the particular circumstances under which they accrued. He should also have framed the prayer of his bill in such a manner that the court would be enabled to direct an account of the debt and credit to be ascertained here, and to decree a payment of the balance which was justly due. As the bill now stands, the defendants are entitled to a dissolution of the injunction, except so much thereof as restrains them from proceeding against the complainant as drawer and indorser of the bills and notes which were drawn and indorsed by him as an officer of the corporation.

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But as the complainant has asked leave to amend the prayer of his bill, I shall endeavor to modify the injunction in such a manner as to do justice between the parties, and shall permit the complainant to amend his bill, if he thinks proper to avail himself of such permission.

It is very doubtful whether the bill, as it now stands, is anything more than a bill of discovery. To such a bill, the answer of the defendants would necessarily be different from the answer to a bill of discovery and relief. In the latter case, many matters of defence might properly be set up, which would be unnecessary and impertinent in an answer to a bill of discovery merely. If the complainant avails himself of the permission to amend, it must be on

1828. payment of the costs of the former answer and of the subsequent proceedings thereon.

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N. York. If the complainant prefers to have his account with the trustees settled under the direction of this court, as he has not disclosed the items or amount of the set-off which he claims, he must pay into court the amount of the stock notes with interest, to abide the further order and decree of the court, and the injunction will then be retained. But if he prefers to avail himself of a defence at law, I can only require of the defendants, as a condition of the dissolution of the injunction, that they stipulate to allow him to give in evidence any equitable set-off which he had against the demands of the bank at the time of the dissolution of the incorporation.

[*114] *PATTERSON v. THE MAYOR, &c., OF THE CITY OF NEW YORK and J. R. PETERS.

The Court of Chancery has no power to review upon the merits the proceedings of the commissioners of estimate and assessment of damages in opening streets in the city of New York.[1]

Where the commissioners, after they had deposited a copy of their report in the clerk's office, pursuant to the 182d sec. of the act of the 9th of April, 1813, (2 R. L. 417,) altered their assessment of damages, it was held not to be necessary to deposit a new copy of their report in the clerk's office, or to publish a new notice to propose objections to the assessment.

But if it was necessary to file a new copy of the report and publish a new notice, the omission to do so would only render the proceedings voidable; in which case, the remedy would be by *certiorari*.

The Court of Chancery has no jurisdiction in such cases, unless the proceedings are wholly void.

June 8th. THE complainant filed his bill in this cause for relief against an order of the Supreme Court, made in August term, 1827, confirming the report of commissioners of esti-

[1] *Wiggin v. Mayor of New York*, 9 Paige, 16. *Whiting v. Mayor of New York*, post, 548.

mate and assessment, in relation to the improvement of Herring street, between Christopher and Amos streets, in the ninth ward of the city of New York. He complained that after the commissioners had deposited a copy of their report in the clerk's office, agreeably to the provisions of the 182d section of the act of the 9th of April, 1813, (2 Rev. Laws, 417,) in which he was allowed \$500 for his damages, they reduced that allowance to \$250. He alleged that he made no objection to the first sum, and was not aware of the alteration in time to apply to the Supreme Court to oppose the confirmation of the report; and he prayed an injunction to restrain the corporation from completing the improvement by removing his dwelling-house, &c.

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An *ex parte* application having been made for the injunction, the Chancellor directed notice of the application, and a copy of the bill to be served on the attorney of the corporation.

J. Grim, for the defendant, cited *Gardner v. The Trustees of Newburgh*, (2 John. Ch. Rep. 162,) and 15 John. Rep. 537.

**M. Ulshoeffer*, for the defendants, cited *Leroy v. The Corporation of New York*, (4 John. Ch. Rep. 352;) *Jerome v. Ross*, (7 John. Ch. Rep. 315;) Salk. 148; 1 Bac. Abr. tit. *Certiorari*, g.; 20 John. Rep. 430.

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THE CHANCELLOR:—Two questions arise in this cause, which it may be necessary to consider. 1st. Was there any irregularity in the proceedings complained of? 2d. If there was irregularity, has this court jurisdiction to stay the proceedings of the corporation by injunction? The cases of *Leroy v. The Mayor, Aldermen and Commonalty of the city of New York*, (4 John. Ch. Rep. 352,) and *Mooers v. Smedley*, (6 John. Ch. Rep. 28,) conclusively settle the principle, that this court is not authorized to review the proceedings on the merits.

The alleged irregularity is, that the commissioners altered

1838. the assessment and reduced the amount allowed to the com-
 Patterson plainant, without any written objections being put in by
 v. him, and without notice to the complainant to appear and
 Corporation of oppose. On looking into the statute under which these
 N. York. proceedings were had, I am inclined to believe it was not in-
 tended by the legislature that any further notice should be
 given than the one which was published in this case. In
 the assessment and appraisal of damages in these street
 cases, what is allowed to that class of persons whose prop-
 erty is taken for the improvement, is to be charged upon
 another class whose property is supposed to be benefitted
 thereby. The necessary result of this is, that if any one
 objects to the amount allowed to or assessed upon himself,
 the commissioners cannot alter that allowance or assessment
 without making a corresponding change in relation to some
 or all of the others.

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The statute directs the deposit of the copy of the report and public notice thereof to be given in the newspapers, and of the time and place of presenting the report to the Supreme Court for confirmation. If any person is dissatisfied, he may within ten days make his objections in writing to the commissioners; and if objections are made, they must review the assessment before presenting it to the court. The legislature *never could have contemplated the deposit of a new copy and a new notice to propose objections, as often as the commissioners reviewed their assessment. Such a construction of the act would be productive of great and unnecessary delay, and would be inconsistent with the provision which directs the notice of presenting the report to the court to be given at the same time with the notice of the depositing the copy for inspection, that objections in writing may be made thereto. The notice to propose objections to the report is a sufficient notice to those who are satisfied with the original report, to appear before the commissioners and oppose any alterations which may be proposed by the persons objecting. At the expiration of the ten days, they can apply to the commissioners and as-

certain whether any objections are made, and they will then be at liberty to be heard in opposition thereto. If the commissioners decide in favor of the objections, the original notice points out the time and place for the persons aggrieved thereby to appear before the Supreme Court and oppose the adoption of such amended report.

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But if the proceedings were irregular in this respect, this court cannot interfere, unless the irregularity is such as to make the whole proceedings void. Probably this court would not suffer the corporation to pull down the complainant's house, and dispossess him of his property under color of authority, where the whole proceedings were absolutely void. But if there is an irregularity which renders the proceedings voidable merely, this court has not jurisdiction to afford the relief sought. Persons other than the corporation have rights vested under the order of confirmation, which can only be divested by a direct proceeding, to annul the order of confirmation. The result of a reversal on *certiorari* would be to vacate the proceedings, so far as they had been irregular, and to place the parties in the situation in which they were before the order of confirmation. But the effect of a perpetual injunction to stay the defendants from pulling down the complainant's house, would be to prevent the contemplated improvement, and at the same time leave the corporation liable to the other persons, in whose favor damages have been allowed.

*In this case the proceedings were, at most, voidable; they were not void.

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If the complainant was entitled to notice to appear before the commissioners and oppose the reduction of his allowance for damages, he had a perfect remedy at law by *certiorari*. He was apprised of the alteration in August term, 1827; and if he had then applied for and obtained that writ, he would long since have had the decision of the proper tribunal on his case. He had no right to expect the corporation would pay the difference between the original and the amended reports. If he is entitled to the larger

1828.	sum, it must be assessed upon those who are benefited by
French	the contemplated improvement.
v.	The motion for the injunction must be refused with costs.
Kirkland.	

FRENCH AND ANOTHER v. KIRKLAND AND OTHERS.

Under the act of the 12th of April, 1816, for draining the great marsh or swamp on the Canasara Creek, in the towns of Sullivan and Lenox, in the county of Madison, the proprietors of the lands overflowed by that creek have a right to drain the marsh according to the provisions of the act, although in so doing they would divert the water from the mill of the complainants, which is situated on the Chitteningo Creek; inasmuch as at the time the act was passed they could have drained the marsh in the manner contemplated by that act, without injuring the mill of the complainants on the stream below; since which time, the greater portion of the waters of the Chitteningo Creek have been diverted by the state to supply the Erie canal. By the 5th section of the act, the complainants have a complete remedy against the proprietors of the land to be benefited, for all damages they may sustain in consequence of the draining of the marsh. Whether they would have such remedy against the state? *Quere.*

June 19th. BY the act of the 12th of April, 1816, entitled "An Act for draining the great marsh or swamp on the Canasara Creek, in the towns of Sullivan and Lenox, in the county of Madison, and for other purpose," the proprietors of the lands overflowed by the waters of the Canasara Creek, or otherwise called the Great Marsh, are authorized to drain the same by one or more canals or ditches to be cut and opened from the sand marsh or creek by the most direct and *convenient route or course into the Oneida Lake; and also, if necessary, by lateral canals and ditches from the marsh to the main canal or ditch. Commissioners are to be appointed to assess and impose upon the lands of the proprietors rendered more valuable, or in any wise benefited by reason of the cutting of the said canals, such sums of money as they may think reasonable and just, not ex-

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ceeding \$2 per acre, towards defraying the expenses of the operations and the subsequent repairs. And the lands may be sold for the payment of such assessments, if the proprietors shall neglect to pay the same. By the 5th section of the act, it is provided, that in case any person shall be injured, or suffer damage by occasion of the canal and draining of the land, the commissioners shall estimate and determine the amount of such damage, and shall thereupon assess the same upon the proprietors; and cause the same to be collected in like manner as the assessment for the expenses of draining off the lands, and paid over to the persons entitled to such damages.

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The waters of the Canasaraga and Cowasalone creeks unite in the southerly part of the marsh. After their junction, the united stream is called the Black Creek; the most northerly bend of which is within the marsh, near the north edge thereof, about three-fourths of a mile from the Oneida Lake. It is at this point the agents of the proprietors are cutting a canal or drain from the Black Creek to the lake. The complainants are the owners of a mill on the Chitteningo Creek, some distance below its junction with the Black Creek. They allege that the cutting the canal into Oneida Lake will divert the water from their mill, and render it useless; and they pray an injunction to restrain them from continuing their operations.

N. P. Randall, for the complainants.

Jonas Platt, for the defendants.

THE CHANCELLOR:—It is contended on the part of the complainants, that the act of 1816, being for the benefit of the individual proprietors of the lands in the marsh, must be *construed strictly; and that in so construing it, the defendants have no right to interfere with the waters of Black Creek. On looking at the localities of the marsh and creeks, on the map which has been considered by both

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parties on the argument as correct, I am satisfied the defendants are proceeding to drain the marsh in the manner contemplated by the act of 1816, and are not exceeding the powers granted by that act. At the time the act was passed, they could have drained the marsh in the manner they are now endeavoring to do, without injuring the property of the complainants or other owners of mill privileges on the stream below. Since that time, however, the greater portion of the waters of the Chitteningo Creek have been diverted by the commissioners of the state for the purpose of supplying the canal. The owners of the marsh having a vested right to drain their lands in this manner, previous to the passing of the canal law, it may well be doubted whether the complainant's remedy for any damage they may now sustain in consequence of the exercise of this right, is not against the state instead of the owners of the lands drained. But, if otherwise, the act of 1816 has given them a full and perfect remedy. In giving a construction to that act, it may be necessary to refer to the previous law which existed in relation to the Great Marsh.

On the 4th of April, 1806, an act was passed, authorizing the draining of this marsh, the first section of which act was substantially the same as that of 1816. The second section made it the duty of the surveyor-general to ascertain the practicability of draining, and to direct the manner of doing it. The third section provided for the appointment of commissioners of assessment, to apportion the expenses of the draining among the proprietors in proportion to the benefit by them respectively received; and any real or personal estate belonging to each proprietor was made liable to be sold for the payment of his share of the expense. The fourth section provided for the assessment of damages to other persons, and gave a similar remedy for the collection of the amount from the proprietors. The act of 1816 changed the mode of payment, both as to the damages and the expenses. Instead *of the individual and personal responsibility of the

proprietors, their lands alone are made liable for the payment. In the case of expenses, however, the restriction has gone still further; and the amount chargeable upon the land of each proprietor can in no instance exceed two dollars per acre. But in relation to the damages, no such limitation is provided. The fifth section of the act of 1816 is copied from the act of 1806; and the principle of assessment there intended, means the principle of apportioning the amount of damages among the proprietors in reference to the benefit received by each. The legislature never could have intended to limit the damages to be paid to third persons in consequence of the acts of the proprietors, to two dollars per acre.

It was reasonable, as the proprietors acted by a majority, that the rights of the few should be protected against the acts of the many, by a proper limitation. But such limitation would be unreasonable in relation to the damages done to third persons, for the joint benefit of the proprietors. If any doubt exists as to the intention of the legislature, it is the duty of the court, in construing their acts, to presume they did not intend to take away individual or private property without just compensation to the owners. The complainants have, therefore, a legal and adequate tribunal to ascertain, collect and pay any damages they may sustain by reason of the draining of the marsh; and the motion for an injunction is refused with costs.

1828.
McGown
v.
Wilkins.

McGOWN v. WILKINS.

In mortgage and partition sales in Chancery, if the premises are not sold at the risk of the purchaser, he will not be compelled to complete the purchase, in case the premises should be incumbered, or no title should pass by the sale, or there should be difficulty in obtaining possession.

THE complainant applied for an order that Thomas Brass. June 25th.

1828.
 McGown
 v.
 Wilkins.

a purchaser of the premises in petition, be compelled to complete his purchase. Brass resisted the application, on the ground *that a third person was in possession at the time of the sale, claiming to hold adversely to the title of the complainants; and that the person so in possession is wholly insolvent, and refuses to give up the possession. The purchaser bid the full value of the premises; none of the parties at the sale supposing the person in possession claimed to hold adversely, or that he intended to retain possession.

James Smith, for petitioner.

J. Wallis, for purchaser.

THE CHANCELLOR:—The title to the premises is undoubtedly sufficient, and the only question in this case is, whether the purchaser is bound to complete the purchase, and be at the expense of an ejectment suit against a person who can neither pay the costs or mesne profits, to obtain possession of the premises for which he has paid the full value. This is not like the case of a sale by the sheriff on execution. There the court never gives possession to the purchaser, even as against the party to the suit. In mortgage and partition cases, the proceeding is directly against the land; and this court will compel the delivery of the possession to the purchaser, as against the parties in the suit, and those who have come into possession under them pending the litigation. For the purpose of obtaining a fair price for the premises on such sales, it is important that purchasers should know, that if they pay a fair price for the property, and it is sold without reserve, they will be protected by the court, and will not be compelled to take an incumbered or worthless title. If there is any cloud upon the title, or incumbrance upon the land, or difficulty in obtaining possession, the property should be sold at the risk of the purchaser in that respect; and in

the amount bid, there would then be a reasonable allowance for such risk. In this case, I think the purchaser should not be compelled to take the title, unless the parties, for whose benefit the property was sold, can give him the peaceable possession of the premises. If that cannot be done, the property must be put up again, and sold at the risk of the *purchaser, unless the parties interested in the amount bid at the first sale consent that the expenses of obtaining possession, and the value of the meane profits from the time of the completion of the purchase until possession is delivered to the purchaser, be paid out of the purchase-money.

1828.

Benson
v.
Le Roy.

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BENSON AND OTHERS v. LE ROY AND OTHERS.

Where one party is examined as a witness against another party in the same cause, he may be cross-examined, like any other witness, by the party against whom he is called, and his evidence cannot be used in his own favor.

But where a party is examined before a master in relation to his own rights, the examination is in the nature of a bill of discovery. He cannot be cross-examined by his own counsel, nor can he give evidence in his own favor any farther than his answers are responsive to the questions put to him.

He may, however, accompany his answer by explanations responsive to the interrogatory, which may be necessary to rebut any improper inference arising from such answer.

ON the application of the defendants, Roswell L. Colt June 30th. was ordered to be examined as a party, before the master, in relation to a claim made by him against the estate of Jacob Le Roy, deceased, in the hands of the defendants. The object of the defendants was to show, that certain entries in the books of the partnership were not made previous to the death of Le Roy. Among other questions put to Colt, by the defendants, he was asked where he was at the death of Le Roy, and how long he had been there?

1828.

Benson
v.
Le Roy.

He answered, that he was at Trenton, and had been there about four days. His own counsel then proposed to ask him when he left the city of New York to go to Trenton, and how long he had been in New York prior to his so leaving it. To this, the counsel of the defendant objected, and the master refused to put these questions to the examinant. An application was then made to this court to reverse the decision of the master.

D. B. Ogden and O. Hoffman, for the motion.

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**R. Emmet and J. I. Rosevelt*, contra.

THE CHANCELLOR:—When a party is examined as a witness against another party in the cause, he stands in the same situation as any other witness, and may be cross-examined by the party against whom he is called; but his testimony cannot be used as evidence in his own favor. When he is examined before a master, in relation to his own rights in the cause, the examination is in the nature of a bill of discovery. There can be no cross-examination by his counsel; and he cannot give testimony in his own favor, except so far as his answers may be responsive to the questions put by the opposite party. To that extent, his answers are evidence in his own favor, on the same principle that the answer of a defendant, responsive to the bill, is evidence against the complainant. The ancient practice was to file written interrogatories for the examination of a party, to which he put in his answer in writing. The modern practice of examining orally before the master, does not alter the rights of either party. The examinant may accompany his answer by any explanation, fairly responsive to the interrogatory, which may be necessary to rebut any improper inference arising from the answer.

In this case, the fact that the examinant was in Trenton at the death of Le Roy, and for four days previous thereto, could raise no presumption that he was not in New York

immediately before that time. The evidence in his own favor, which was attempted to be drawn from him by the questions put by his counsel, was not fairly responsive to the questions put by the other side, "Where were you at the death of Le Roy? and how long had you been there?" The master, therefore, decided correctly in refusing to permit the examinant to answer the questions put by his own counsel; and this application to reverse the decision of the master is refused, with costs, to be paid by Colt, the applicant.

1828.

Hurd
v.
Everett.

*HURD AND SEWALL v. EVERETT.

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Amendments to a bill, when allowed, are always considered as forming part of the original bill. They refer to the time of filing the bill, and the defendant cannot be required to answer anything which has arisen since that time.

THIS was a petition for a rehearing, on exceptions to June 30th. master's report, disallowing exceptions to third answer of defendant to the amended cross-bill.

H. D. Sedgwick, for the complainants.

W. Slosson, for the defendant.

THE CHANCELLOR:—The amendments to a bill, when allowed, are always considered as incorporated in, and as forming part of the original bill. They have reference to the time of filing the bill, and the defendant cannot, by any amendment, be called upon to answer any thing which has occurred since that time. Considering the amended bill in this cause as an entirety, and as if the defendant was now for the first time called upon to answer it, the prayer introduced by the last amendment is perfectly senseless, and is

1888.
In the Matter
of Howe.

not supported by any thing contained in the bill. It presents the strange anomaly of a prayer in a bill, that the defendant may be compelled further to answer as to matters which will be contained in his answer, but which are no where referred to in the bill, except in such prayer. The subject matter of the exception relied upon in this case was, therefore, such as the defendant was not bound to answer.

Independent of this informal and impertinent prayer, the subject matter of the bill, as amended, is fully answered.

The petition for a rehearing is dismissed, with costs to be paid by the complainants.

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*IN THE MATTER OF THE PETITION OF HOWE AND WIFE.

H. was seized in his own right of an undivided fourth part of a tract of land, and was also seized in right of his wife of one other undivided fourth part thereof. D. & T. also each owned one undivided fourth part. The share of T. was subject to a mortgage. A voluntary partition was made of the premises between the parties, by which two lots thereof were released by D. & T. to H. and wife, and the residue was released by H. and wife to D. & T. as tenants in common, they paying to H. and wife \$675 for the difference in value. Afterwards the mortgagee, without regarding the partition, and without making H. and wife parties to the suit, foreclosed his mortgage against T. in Chancery, and sold one undivided fourth of the whole premises, leaving a balance due on the mortgage after the sale. Previous to the foreclosure, and subsequent to the partition, several judgments were recovered in the Supreme Court against T. T., after the recovery of these judgments, assigned all his property to trustees for the payment of his debts. Subsequent to this assignment, the premises released as aforesaid by H. and wife to D. & T. were sold by virtue of a decree in Chancery, obtained in a partition suit brought by one of the heirs of D. One-half of the proceeds of this partition sale had been paid to the representatives of D., one-fourth to the mortgagee of T., and the remaining one-fourth was in the hands of the master. Under these circumstances, this remaining one-fourth was decreed to be applied in satisfaction of the balance due on the mortgage against T., for the purpose of discharging the two lots released to H. and wife from the lien of that mortgage.

Had the mortgagees made H. and wife parties to the bill for foreclosure of the mortgage against T., the court would have decreed a sale only of the share assigned to T. upon the voluntary partition. The equitable rights of H. and wife were not altered or affected by the general assignment of T., for the benefit of his creditors, or by the judgments recovered against him subsequent to the voluntary partition.

The general assignees of a bankrupt, take his estate subject to every equitable claim existing against it on the part of third persons; and this is the case, although they had no notice of such claims at the time of the assignment. A different rule exists in the case of mortgagees and *bona fide* purchasers of the legal estate.

Judgment creditors have no preference over prior equitable claims against the estate of the debtor.

Thus a contract for a mortgage or the sale of real estate, has been preferred to judgments recovered subsequent to the contract.

An agreement for a mortgage is, in equity, a specific lien on the land.

1822.

In the Matter
of Howe.

PREVIOUS to the 3d of January, 1817, the petitioner, June 30th. Howe, was seized, in his own right, of one undivided fourth part of a certain tract of land in the city of New York; and was also seized in right of his wife, of one other undivided *fourth part thereof. David Dunham owned one undivided fourth, and the remaining one-fourth belonged to D. D. Tompkins. The share of Tompkins was subjected to the lien of a mortgage given by him to George J. Banks, in October, 1806. On the 3d of January, 1817, an unequal division of the premises was made by the parties in interest; by which two lots were released by Dunham and Tompkins to Howe and wife, and the residue was released by Howe and wife to Dunham and Tompkins, as tenants in common; they paying to Howe and wife \$675 for the difference in value. In December, 1821, Banks filed a bill in Chancery to foreclose his mortgage, without noticing the partition which had been made of the premises, and without making Howe and wife parties. A decree was obtained for the sale of one undivided fourth part of the premises as originally mortgaged; and at the sale, Banks bid the same in, leaving a considerable balance still due on his mortgage. In May, 1821, three judgments were recovered in the Supreme Court against D. D. Tompkins, which judgments have since

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In the Matter
of Howe.

been assigned to G. W. Tompkins, as guardian of Ray Tompkins, an infant. In July, 1821, another judgment was recovered in the same court in favor of Mangle Minthorne. On the 15th of January, 1822, D. D. Tompkins made a general assignment of his property to Isaac Pierson and others, as trustees, for the payment of his debts; and two days thereafter, Cornelia Juhel recovered another judgment against him in the Supreme Court. In 1825, one of the heirs of Dunham filed a bill in this court against his widow and the other heirs, for partition of the lands released by Howe and wife to Dunham and Tompkins, to which suit Banks and the assignees of Tompkins were also made parties. Under a decree in that cause, the premises have been sold. One-half of the proceeds have been distributed among the representatives of Dunham, one-fourth has been paid to Banks, and the remaining one-fourth is in the hands of the master, subject to the further order of this court. The petitioners claim to have the moneys in the hands of the master applied in satisfaction of the balance due on Bank's mortgage, for the purpose of discharging their two lots from the lien of that mortgage. [*127] *The judgment creditors of Tompkins claim to have it applied towards their judgments, and the assignees of Tompkins claim it for the benefit of the creditors generally. The balance due to Banks on the mortgage, after deducting the whole amount, for which the original undivided fourth sold upon the foreclosure, exceeds the amount of the fund now under the control of the court.

C. C. King, for the petitioners.

W. Kent, for G. W. Tompkins.

D. S. Jones, for the executors of Minthorne.

H. W. Warner, for the assignees of Tompkins.

W. Slosson, for Cornelia Juhel.

THE CHANCELLOR:—If the division of the property between the original owners, threw the whole mortgage previously given by Tompkins upon his undivided half of the premises released to himself and Dunham on that division, Banks would clearly be entitled to the funds in the hands of the master, to satisfy the balance now due on his mortgage. That balance would still remain a lien upon so much of that undivided half as was not sold under the decree of foreclosure. But if, after that division, as I am inclined to believe, under the circumstances of this case, the mortgage remained a lien at law upon the one-fourth of the two lots conveyed to Howe and his wife in severalty, the foreclosure was a nullity as to these lots, Howe and wife not being parties thereto. And the balance due on the mortgage being a subsisting lien on the undivided fourth part of the two lots, it may still be enforced against them. Howe and wife have therefore a direct interest in having this balance paid out of the moneys arising from the sale of that part of the property which they gave him in exchange on the original division. As between Howe and wife and Tompkins, there could be no doubt of their equitable claim to have those moneys thus applied. If Banks had filed his bill to foreclose the mortgage immediately after that division, and had made Howe and *wife and Dunham parties to the same, there can be no doubt that this court would have decreed a sale of the share assigned to Tompkins on that division, to satisfy the mortgage. And the question which now arises is this: Are the equitable rights of Howe and wife altered or divested by the general assignment of Tompkins for the benefit of his creditors, or by the judgments which have been recovered against him subsequent to that division? It is a well settled rule of equity, that the general assignees of a bankrupt take his estate subject to every equitable claim which exists against it by third persons; [1] and that they cannot avail themselves

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[1] The assignee succeeds only to the rights of the assignor: *Luchenbach v. Brickentien*, 5 Watts & S. 145, takes the property subject to all equities:

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of Howe.

of the legal estate thus acquired, to defeat a prior equity, of which they had no notice at the time of the assignment. They differ in this respect from *bona fide* purchasers of the legal estate, and from mortgagees who have advanced their money on the credit of the land, and who are considered *quasi bona fide* purchasers.

I can see no good reason why a different rule should be applied to general assignees, for the benefit of all the creditors, created by the voluntary act of the debtor, from that which prevails in respect to those created by operation of law. Neither can be considered as *bona fide* purchasers, who are protected because their legal estate is united to an equal though subsequent equity. Sir Simon Stuart's case, referred to by the counsel and by the Lord Chancellor, in *Burn v. Burn*, (8 Ves. jun. 576.) was an actual conveyance to trustees for the benefit of creditors; and yet it was held that a prior contract for a mortgage was entitled to a preference. The case might be different where creditors, without notice of the prior equity, had released their debts in consideration of an assignment made to trustees for their benefit.

The judgment creditors of Tompkins are in no better situation than his general creditors in relation to this fund. Their judgments were not specific liens on the land to which the petitioners' equity attached. They were general liens on all the estate of the judgment debtor; but as such they cannot prevail as against the prior equity of the petitioners.[1] I have not found any reported case in this state, where this question has been examined. It has frequently

Moody v. Litton, 2 Ired. Eq. 382; *Leger v. Bonnaffe*, 2 Barb. S. C. 475; *Addison v. Burckmyer*, 4 Sanf. Ch. 498; and to all liens, *Corning v. White*, 2 Paige, 567; *Haggerty v. Palmer*, 6 John. Ch. 437; if on buildings, for building materials; *Twelves v. Williams*, 3 Whart. 485, and he takes deposits in banks, subject to any lien of the bank existing when the assignment was made, *Beckwith v. Union Bank*, 4 Sanf. S. C. 604, and land subject to the interest of devisees; *Swoyer's Appeal*, 5 Barr. 377. See further Am. Ch. Dig. by Waterman, tit. *Assignment*.

[1] See *Dwight v. Newell*, 3 Comst. 185.

been discussed *in the English courts, and sometimes in the courts of this country ; and I have once had occasion to examine it in the equity court for the fourth circuit.

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of Howe

The earliest case on this subject which I have found, is *Burgh & Burgh v. Francis & others*, decided by Lord Keeper Finch, in 1670. (Cases Temp. Finch, 58 ; 1 Eq. Cas. Abr. 820, S. C.) In that case, a bill was filed by the executors of an equitable mortgagee against the heir at law of the mortgagor, and his judgment creditors, to perfect a defective conveyance by way of mortgage, and to be relieved against the judgments, which at law were a lien upon the mortgaged premises. The court decreed a perpetual injunction against the judgment creditors, unless they should choose to come in and redeem the mortgage, which the heir at law was directed to give. This decree is said to have been afterwards affirmed by Lord Nottingham. (Per Vernon, *arguendo*, 1 Peer Wms. 279.) There is a note in Fonblanque's *Treatise on Equity*, (1 Fonb. 84, note r,) referring to that case, and by which its authority is attempted to be shaken. But the annotator is evidently wrong in supposing that is the only case to be found in the books where a court of equity has interfered, in prejudice of a defendant having a legal interest for a valuable consideration and without notice. The decision in the Suffolk case, referred to in Nelson's Reports, (1 Nels. Ch. Rep. 184,) supports the decision in *Burgh v. Francis* ; and in 1715, the same principle was most distinctly recognized by Lord Cowper, in the case of *Finch v. The Earl of Winchelsea*, (1 Peer Wms. Rep. 282.) In *Burn v. Burn*, (3 Ves. jun. 576,) the counsel, Sir John Scott, attorney-general, (afterwards Lord Eldon,) and Mr. Mitford, solicitor-general, (afterwards Lord Redesdale,) state it as a well known principle, that courts of equity constantly control the effect of judgments subsequent to a contract for the sale of the estate. And in the case of *Sir Simon Stuart's* estate before referred to, it was also held that the equitable mortgagee was entitled to a preference over subsequent judgment creditors.

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Bank.

In *Delaire v. Keenan*, (8 Desauss. Rep. 74,) the Court of Chancery of South Carolina decided, that an agreement for *a mortgage was in equity a specific lien on the land; and that the mortgagees were entitled to a preference over subsequent judgment creditors. Chancellor Desaussure, in delivering his opinion, refers to the decision of Lord Cowper, in *Finch v. The Earl of Winchelsea*, and says the opinion delivered in that case has been the settled doctrine ever since. The same principle was sanctioned by the Supreme Court of Pennsylvania, in the case of *Foster v. Foust*, (2 Serg. & Rawle, 11,) and by Washington, Justice, in the case of *Hurst v. Hurst*, in the Circuit Court of the United States. (2 Wash. C. C. Rep. 69; 3 Binney, 347, note, S. C.) The same principle is recognized by several elementary writers, as the established doctrine of the courts of equity in England. (Sugden's Law of Vendors, 386; 2 Cruise's Dig. 64, tit. 14, Estate by Statute, Merchant, &c., sec. 50.)

In the matter before me, I can decide in favor of the manifest equity of the case, not only without disturbing any known legal or equitable principle, but in perfect accordance with the settled doctrines of this court. I shall therefore direct the moneys in the hands of the master to be paid over to Banks, in satisfaction of the balance due on his mortgage.

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*COVELL v. THE PRESIDENT, DIRECTORS AND COMPANY
OF THE TRADESMAN'S BANK, AND MULLINS.

C. held a single bill, or sealed note, against H. for \$2,425, payable to himself in twelve months from the date with interest. C. borrowed of M. \$100, and pledged this sealed note to him to secure the repayment, and indorsed his name in blank on the note. M. being indebted to the Tradesman's Bank in the sum of \$2,600, agreed to transfer the note to the bank, as security for \$1,000, part of the debt he owed the bank, provided the bank would advance to him the remainder of the note. The bank advanced the money, and M. indorsed his name in blank on the note, and delivered it to

the bank. M. afterwards became insolvent, and never paid any part of the \$1,000, or of the money advanced to him by the bank. Soon after C. delivered the note to M., M. received a larger sum of money belonging to C. than the amount C. owed him. The bank were ignorant of the right of C., and gave H. notice not to pay the note to any one except themselves. C. gave notice to the bank of his title to the note, and demanded it from them. The bank refused to deliver C. the note. Held, that C., having both the prior equity and the legal right, was entitled to the note.

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Had the note been negotiable, and had it been taken by the bank in the usual course of business, the equity of the bank would have been equal to that of C.; and the legal right of the bank to collect the money due on the note in their own name would have prevailed over the prior equity of C.

Aliter, if the note, although negotiable, had been transferred to the bank merely as a security for an antecedent debt.

Where the equities of the parties are equal, the party who has the legal right will prevail.

If neither party has the legal right, the maxim *qui prior est in tempore, potior est in jure*, applies.

The assignee of a chose in action, who only obtains an equitable interest therein, and who must sue in the name of the original owner, is not protected against a prior equity.

THE complainant held a single bill, or sealed note, against July 7th. T. and J. Hunt, for \$2,425, payable to himself, in twelve months from date, with interest, and dated the 27th of September, 1826. On the 19th of October, in the same year, he borrowed of the defendant Mullins, a broker, the sum of \$1,000, and pledged the sealed note to secure the repayment, indorsing his name in blank on the note. Mullins gave him a receipt for the note, promising to return it when he should receive the \$1,000. On the 10th of November, 1826, Mullins being indebted to the Tradesman's Bank, about \$2,600, went to the cashier pretending to be owner of the *note, and proposed to let the bank have it in security for \$1,000 of that debt, provided the cashier would advance him the residue of the amount of the note in money. The proposition was acceded to. Mullins indorsed his name in blank on the note, delivered it to the cashier, and received the balance in money, which the cashier advanced for the bank, on the credit of the note, without any knowledge or suspicion of any right or claim

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on the part of the complainant or of any one else. The cashier had previously ascertained from the Hunts, that they justly owed the note to Covell, and that they intended to pay it when it became due. At the time the sealed note was received by the bank, the cashier took Mullins' note for the whole amount due from him, including the money then advanced; and the sealed note was taken as security for the payment. The cashier testified, that his object in taking Mullins' note was to insure the payment of interest every sixty days. Mullins has never paid any part of the \$1,000, or of the advance to him. Soon after Covell left the sealed note in pledge to Mullins, the latter received a considerable sum of money for Covell, which, after deducting the \$1000 and a previous loan, left \$310 due from him to Covell; which balance still remains unpaid.

The bank gave notice to the Hunts of the assignment of the sealed note, and that they must not pay it to any one else. After Covell ascertained that the sealed note had been assigned by Mullins, he gave notice to the bank of his right, and applied by his counsel to have the note delivered up to him; which was refused. Since the commencement of this suit, by an arrangement between the parties, the injunction has been modified so far as to permit the money to be collected; and the same is now deposited in one of the banks of the city of New York, to abide the decision of this cause.

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P. Ruggles, for the complainant:—The sealed note pledged by the complainant to Mullins, and by him transferred to the Tradesman's Bank, not being negotiable, went into the possession of the bank, subject to all the equities which existed between the complainant and Mullins. The *complainant's name being indorsed on the note, amounted to nothing more than an assignment as security for the \$1000 borrowed from Mullins; and that sum having been received by Mullins, neither he, nor any person claiming under him, could hold the note as against the complainant. An as-

signee of a chose in action takes it subject to the same equity it was liable to in the hands of the assignor. (1 Mad. Ch. last ed. 547; 2 Vern. 692; id. 764; *Clute v. Robinson*, 2 John. R. 595; 1 John. Dig. 58; *Chamberlain v. Gorham*, 20 John R. 144; *Davies v. Austin*, 1 Ves. jun. 249; *Bank of Niagara v. M'Cracken*, 18 John. R. 498.) If the sealed note is to be considered as a pledge in the hands of Mullins, and as a chattel, he could make no disposition of it, not even to raise the money for which it was pledged, without giving reasonable notice to the complainant to redeem it. (*Hart v. Ten Eyck*, 2 John. Ch. R. 100; 1 Madd. Ch. 529.) The defendants having refused to deliver the note to the complainant when demanded, and after having notice of his rights, ought to pay him his costs.

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Bank.

W. Slosson, for the defendants:—The defendants are entitled to all the protection of *bona fide* holders of the note. The complainant, by indorsing the note in blank, authorized the holder to fill it up, with an assignment of the whole interest direct to the Tradesman's Bank, or to any one else. The complainant having given this power, he must abide the consequences of a transfer to a *bona fide* purchaser. (*Lovell v. Evertson*, 11 John. R. 52; *Mitchell v. Culver*, 7 Cowen, 336, 337, and note.) After such a blank indorsement, the purchaser is not bound to look to any latent equity between the assignor and Mullins. (*Murray v. Lyburn*, 2 John. Ch. R. 443; *Livingston v. Dean*, Id. 480.) The principle is a fundamental one in equity, that where one puts it in the power of another to hold himself out as the absolute owner, he cannot set up, as against a *bona fide* purchaser, any latent equity not known to such purchaser. (*Niven v. Belknap*, 2 John. R. 589.) The assignee of choses in action is as much protected in equity as the purchaser of goods. The assignment of a sealed instrument may be in writing without seal, and even by *delivery merely. (*Prescott v. Hull*, 17 John. R. 284; *Briggs v. Dorr*, 19 John. R. 95; *Ford v.*

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1838. *Stewart*, 19 John. R. 342. The note, although under seal,
 Covell. was in every other respect a mere promissory note. All the
 v. parties so treated it. The complainant by indorsing the
 Tradesman's Bank note in blank, is liable as upon a new note drawn by him.
 (Chitty on Bills, 184.)

THE CHANCELLOR :—In this case a gross fraud has been practiced by the defendant Mullins, and the question is, upon which of the two innocent parties to this suit must the loss fall? Although it is not distinctly stated in the pleadings and proofs, it seems to be understood by the parties that Mullins is insolvent. As to the \$1,000 which was due from Mullins at the time he transferred the sealed note, there can be no hardship in the case, as respects the bank. They are, as to that sum, no worse off than they were before the note was received in security. The complainant is clearly entitled to that part of the proceeds of the sealed note. In relation to the sum of \$1,425, which Mullins actually obtained in money from the bank by falsely and fraudulently pretending that he was the owner of the note, there is great hardship on both sides. As to the first sum, the complainant has not only the prior but the greater equity. The questions which arise in relation to the last sum, are: 1. Has either party the greater equity? 2. If the equities are equal, has either party the legal right? 3. If neither has the greater equity, or the legal right, which party has the prior equity?

The greater equity must prevail not only against a lesser equity which is prior in point of time, but is sometimes permitted to prevail even as against the legal right. If the note in question had been negotiable, and had been taken by the bank in due course of business, the equity of the bank to retain it in security for the money advanced, would be equal to the equity of the complainant to receive back his note from Mullins; and the legal right of the assignees to collect the money in their own name would prevail over the prior equity of the complainant.

But according to the decision of this court, and of the Court of Errors, in *Coddington v. Bay*, (5 John. Ch. R. 54, 20 John. R. 647, S. C.,) the bank would not *be entitled to retain the proceeds even of a negotiable note thus transferred to them, merely as a security for an antecedent debt. In this case, I cannot find any principle to support the position that the bank has any greater equity to have the money which was advanced on the security of this instrument repaid, than the complainant has to have his note returned to him, agreeably to the terms of his agreement with Mullins. Where the equities of the parties are equal, if either has the legal right, that must prevail; but if neither has a legal right to the subject or thing in controversy, the maxim, *qui prior est in tempore, portior est in jure*, applies.[1] (*Tourville v. Naish*, 3 P. Wms. 808.) It was on these principles, that, in England, if there were two *bona fide* mortgagees having equal equities, and the junior incumbrancer could obtain the legal estate by getting the assignment of an older mortgage, he could tack his junior mortgage thereto, and thus get a preference over the intermediate mortgage; but if there was still a fourth mortgage, older than either, outstanding in the hands of a third person, or if the legal estate was in the hands of trustees, all the subsequent mortgages must be satisfied according to their priority in point of time. (*Brace v. The Duchess of Marlborough*, 2 P. Wms. 491.) On the same

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[1] On this maxim depends the rights of property in treasure-trove, wrecks, *Legge v. Boyd*, 1 C. B. 92; E. C. L. R. 50, and derelicts, *id.* Waifs and estrays, 1 Black. Com. 291; *Armory v. Delamere*, 1 Stra. 504; *Mortimer v. Cradock*, 7 Jur. 45. The law of primogeniture, 2 Black. Com. 83, 84. It is acted on in case of conflicting titles; see argument of Sir E. Sugden in *Cholmondeley v. Clinton*, 2 Meriv. 239; Broom's Maxims, 263 n. In assignments, and between incumbrancers and purchasers; *Foster v. Blackstone*, 1 Mylne & K. 297, 2 P. Wms. 491. In regard to the doctrine of tacking of mortgages, 3 Prest. Abs. tit. 274, 275; *Willoughby v. Willoughby*, 1 T. R. 773, 4. *M'Neil v. Cahil*, 2 Bligh. 228. See 4 Kent, 178, n. The law relative to patents and copyrights is altogether referable to this maxim. Broom's Maxims, 260, 272, and cases there cited.

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principal, a negotiable note payable to bearer or indorsed in blank, which, by commercial usage, may be prosecuted in the name of the holder, if it is in the hands of an agent, or is stolen, or is lost by the owner, and by the improper act of the agent, thief or finder is put in circulation, and thus comes into the hands of a *bona fide* holder in the due course of business, the equal equity of such holder will enable him to retain it against the former owner; while, on the other hand, the assignee of a chose in action, who only obtains an equitable interest therein, and must sue in the name of the original owner, is not protected against a prior equity. (*Coles v. Jones*, 2 Vern. 692. *Norton v. Rose*, 2 Wash. R. 233. *Turton v. Benson*, 2 Vern. 764. *Livingston v. Hubbs*, 2 John. Ch. R. 512.) It will also be found on examination, that the case of *Redfearn v. Ferrier & Somervail*, (1 Dow. Parl. Rep. 50,) cited by Chancellor Kent, in *Murray v. Lyburn*, (2 John. Ch. R. 443,) was decided upon the principles above stated. In that case, a share in the Edinburgh Glass House *Company, which by the rules of the company could only be holden by a single individual, stood in the name of Stuart, but in fact it belonged to the firm of Stuart & Somervail. Their partnership was dissolved by the bankruptcy of Stuart; and after the dissolution, Stuart assigned the share on the books of the company to Redfearn, who had no notice of the equitable claim of Somervail. A question having arisen between Somervail and Redfearn, as to the right to the share, the agent of the company raised an action of *multiple poinding*, (a proceeding somewhat similar to our bill of interpleader,) to settle the rights of the parties. The Court of Sessions in Scotland decided against the rights of the assignee, but on appeal to the House of Lords, that decision was reversed. Not on the ground that the assignee of a chose in action was protected against a latent equity in a third person, because a share in a joint stock company is not a chose in action. It was evidently decided on the ground, that by the law of Scotland the assignment, inti-

mated on the books of the company, vested the legal interest and right to the stock in the assignee; and the equities of the parties being equal, the court would not divest him of his legal right.

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In *Willis v. Twambly*, (13 Mass. Rep. 204,) a note had been given to a minor, payable in sheep. He sold the note to a third person, and received a watch in payment. The infant afterwards elected to rescind the bargain, and tendered the watch to the assignee, who refused to receive it; and afterwards assigned the note to a *bona fide* assignee without notice. The court held, that the first assignee could transfer to the second no greater right or interest in the note than he had himself; and that the second assignee took it subject to all the equity which existed between the infant and the first assignee. In the same case, Parker, Ch. J., says, "the assignee of a chose in action must take it principally upon the credit of the party from whom he receives it; for it is always liable to be defeated by equitable circumstances subsisting between the original contracting parties, the assignee being subject to the same equity as the assignor.

In the case before me, the sealed note was merely pledged to Mullins to secure the payment of the \$100; to that extent alone he had an equitable claim upon the money due thereon. The complainant still retained the legal interest in the debt from the Hunts; and an action to recover the amount must be brought in his name. After repayment of the \$100, his release to the Hunts would have been a legal and valid discharge of the debt. It was impossible for Mullins to transfer any greater right to the bank than he himself possessed. That was not a legal right, but a mere equitable lien upon the chose in action, which has since been divested, and that before Covell had any notice of the transfer. The maxim, *caveat emptor*, is properly applicable to this purchase of a chose in action. If the agent of the bank had used the same diligence in ascertaining the right of Mullins to the note, as he did in

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ascertaining the liability of the obligors, he never would have advanced the money on the credit of this instrument. The bare signature of Covell on the instrument was certainly no better evidence of the right of Mullins than the signature of the Hunts was of their indebtedness. There was as much occasion for inquiry in the one case as in the other.

Again, the equity of Covell to have his note returned arises out of a transaction prior in point of time to the advance of the money by the bank. The prior equity and the legal right are both united in the complainant; he is, therefore, entitled to the whole of the proceeds of the sealed note. And the defendants having refused to deliver up the note after they were informed of his rights, must pay the costs to which he has been subjected in consequence of that refusal.

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*RICHARDS v. BARLOW AND OTHERS.

Where exceptions are taken to the defendant's answer, some of which are allowed and others are disallowed, and the defendant excepts to so much of the master's report as allowed a part of the exceptions to the answer, and on hearing before the court, the master's report is confirmed, the complainant is entitled to the costs of the hearing, and also of the reference and of those exceptions to the answer which are allowed by the master; and the defendant is not entitled to the costs of the exceptions disallowed by the master.

If any of the exceptions to the answer are well taken, the defendant must submit to answer further as to those exceptions, or he will not have costs of the exceptions which are disallowed by the master.

July 8th.

In this case, exceptions were taken to the defendant's answer, some of which, on reference to the master, were allowed, and the others were disallowed. The complainant submitted to the master's report, but the defendants excepted to so much thereof as allowed a part of the exceptions to their answer. On hearing before the court, the

master's report was confirmed. A question having arisen as to the costs, the questions were submitted to the court.

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THE CHANCELLOR:—The complainant is entitled to the costs of the hearing on the exceptions to the master's report, all of which have been disallowed. He is also entitled to the costs of the reference, and of those exceptions to the answer which were allowed by the master. But the defendant is not entitled to costs on account of the exceptions which were disallowed by the master. If part of the exceptions to an answer are well taken, the defendant must submit to answer as to such exceptions, or he will not be allowed the costs of litigating the others before the master.

*DELAFIELD AND OTHERS v. COLDEN AND OTHERS.

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The object of the law of Congress organising the board of Florida commissioners, was to ascertain who were entitled to indemnity against the Spanish government; not to investigate all the various equities which might arise as to the distribution of the fund awarded for any particular injury.

Where money was awarded by the Florida commissioners upon a memorial of one of two joint owners, and the applicant claimed in his memorial the whole to himself, without naming his joint owner, it was held that the joint owner not named, was not bound to put in his claim and contest his right before the commissioners; that the person who received the money awarded, was a trustee, and accountable in equity to the real parties interested in the fund.

Where the executors, who have no interest in the question, are made defendants in Chancery, they are entitled to their costs out of the fund.

ON the 14th of March, 1798, John Delafield, an insured-July 14th. rance broker, and John B. Church, an insurer, in the city of New York, entered into a co-partnership in the business of marine insurance, which partnership was to continue until dissolved by mutual consent, or by a written notice from either of the parties. By the partnership articles, the

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policies were to be subscribed by Church, in his own name only; and all such policies were to be deemed and taken to be on account of the partnership. All expenses, charges, disbursements, profits and losses incurred concerning the partnership were to be borne and defrayed in equal proportions by the co-partners. On the 29th of November, 1798, Church gave to Delafield written notice, in conformity to the stipulation in the articles, that the partnership would cease after the 31st of December, in the same year; and that he should underwrite on his own account after that time.

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Among the policies underwritten by Church during the continuance of the partnership, on which losses happened, were the two following, which alone are the subjects of controversy in this suit: A policy underwritten by Church on the cargo of the schooner *Dorchester*, the 17th of April, 1798, in the sum of \$1,000; and also underwritten by George Knox, David Smith and others, in the sum of \$3,000. And another policy, dated on the 27th *of November, 1789, on the brig *Eagle*, Churchill master, underwritten by Church in the sum of \$1,000, and by divers other persons in the sum of \$4,000. On the 11th of January, 1799, after the dissolution of the partnership, Church underwrote another policy on the freight of the brig *Eagle*, in the sum of \$1,000, which policy was also underwritten by other persons in the sum of \$4,000. The *Dorchester* was carried into a Spanish port and condemned, with her cargo, in July, 1798. On the 6th of August, 1798, the insurers accepted the abandonment, and agreed to pay the loss; and the assured assigned all his interest to the underwriters. The brig *Eagle* was also carried into a Spanish port and condemned; and the insurers, both on the brig and her freight, accepted the abandonment, and the assured assigned all their interest to John Ferrers, in trust for the underwriters, in proportion to the several sums subscribed by them respectively. Ferrers died in December, 1813, and Church died in 1816, insolvent and intestate. Delafield

lived until the 3d of July, 1824. The executors of Ferrers, in June, 1822, in consequence of an agreement between him and the underwriters upon the cargo of the Dorchester, presented a memorial to the commissioners under the Florida treaty, in the name of George Knox and David Smith, two of the underwriters, in behalf of themselves and the others, setting out the insurance, condemnation, abandonment and assignment for the benefit of the underwriters, and also setting out, among other things, the interest of Mrs. Bunner as the administratrix of Church, but without noticing the partnership, or the claim of Delafield as the surviving partner or otherwise. The claim contained in the memorial was allowed; and the defendant Colden, as one of the executors of Ferrers, in pursuance of the award of the commissioners, received for the share of Church's subscription to the policy, \$700 94, over and above his charges and expenses in obtaining the allowance and payment of the claim.

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In March, 1823, the executors of Ferrers also presented another memorial to the Florida commissioners, setting forth the insurances on the brig Eagle and her freight; and the *condemnation and abandonment, and the assignment to Ferrers for the use of the underwriters; and setting out the claim of the administratrix of Church, but without noticing the partnership, or the claim of Delafield as surviving partner or otherwise on the policy on the brig. The claim was allowed, and the defendant Colden also received for the share of Church's subscription to the policy on the brig, \$593 12, over and above the charges and expenses in obtaining the same, and the like sum for the subscription of Church to the policy on the freight.

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The defendant Colden, as one of the executors of Ferrers, also received, at the same time, other sums which had been allowed under the treaty, on account of other claims upon policies subscribed by Church, the whole amount of which, including the above suma, was \$12,487 14, besides disbursements. Of the amounts thus received, he has paid

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over to the administrators of Church \$11,051 14, leaving still in his hands \$1,486. The complainants claim the half of the proceeds of Church's insurance on the brig *Eagle*, and on the cargo of the *Dorchester*. The administrators of Church claim the whole amount of the proceeds of both.

M. C. Patterson, for the complainants, contended that they were entitled to the whole of the moneys in the hands of the defendant Colden, John Delafield having survived John B. Church; that the legal interest in partnership property passes to the surviving partner; (*Peters' admr. v. Davis*, 7 Mass. Rep. 257;) that the payment by Colden to the administrators of Church was no satisfaction to Delafield or his executors; (*Wallace v. Fitzsimmons*, 1 Dallas, 250;) and that the defendants, Bunner and wife, ought to pay the costs; (*Adair v. Shaw*, 1 Sch. & Lef. 280.)

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Dunlap and J. A. Hamilton, for Bunner and wife, contended that the complainants' remedy was at law; that the legal title to the moneys was in Church; that the rule of survivorship did not apply; that Delafield forfeited all title to any part of the moneys, by not making his claim before the *commissioners; and that the statement in the bill was not broad enough to reach the relief sought.

C. Graham, for the executors of Ferrers, contended that they were bound to appear, and were therefore entitled to costs out of the fund. (1 John. Ch. R. 473, 508; *Morrel and others v. Dickey*, 1 John. Ch. R. 153; *Goodrich v. Pennington*, 3 John. Ch. R. 520; *Rodgers and others v. Ross*, 4 John. Ch. R. 608; *Masters v. Rashley*, 1 Ves. jun. 205; *Attorney-General v. City of London*, 1 Ves. jun. 246.)

THE CHANCELLOR:—The preliminary question which has been raised as to the admissibility of the transcript of the broker's books kept by Delafield, and which transcript is in the handwriting of his deceased clerk, it is not neces-

sary for me to consider; and I lay the evidence derived from those books entirely out of the question, in the decision of this cause. Independent of these books, there is no evidence that Delafield paid the loss upon the brig Eagle, or upon the cargo of the Dorchester. On the other hand, there is no evidence that Church ever paid the same, or any part thereof. In the absence of all proof on the subject, the fair presumption is, that both losses were paid out of the partnership funds; and in that case, it is perfectly immaterial which partner actually paid the loss. By the indorsement on the back of Delafield's bond, which indorsement was signed by both of the partners, it appears that as late as the 1st of November, 1806, nearly eight years after the dissolution of the partnership and more than seven after the adjustment of the loss under the last policy, the partners had a settlement of accounts, of what kind does not distinctly appear; although from the memorandum indorsed on the bond, I think it was not the partnership account. But after a lapse of thirty years from the dissolution of the partnership, it may fairly be presumed that all the partnership accounts were closed previous to the time of the indorsement on the bond. There could be no reason at that time for leaving this part of the partnership accounts open. Although a nominal claim existed against the Spanish government, neither party could then *have had any reasonable expectation of receiving indemnity. There can, therefore, be no doubt of the equitable right of the executors of Delafield to receive their moiety of the net proceeds of the amount awarded under the Florida treaty, on account of the underwriting these two policies by Church during the existence of the partnership. But it is contended that the money was awarded by the board of commissioners, on memorials claiming it on account of the administratrix of Church alone; that Delafield ought to have put in his claim, and contested his right before the commissioners; and that having neglected to do so the award is conclusive against his right.

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On referring to the treaty, and to the law organizing the board of Florida commissioners, I am satisfied such cannot be the effect of the award. The object of organizing the board, was to ascertain who were entitled to indemnity against the Spanish government. It never could have been intended that the board should investigate all the various equities which might arise as to the distribution of the fund awarded for any particular injury. The persons who have prosecuted these claims, and obtained the money on account of any illegal capture or condemnation by the Spanish authorities, are trustees, and are accountable in equity to the real parties who were entitled to the indemnity awarded by the commissioners. But in this case, the complainants must pay their share of what the administrators of Church agreed to give Mr. Hamilton for his services in obtaining the adjustment of the claim. The whole sum being received by Mr. Colden at the same time, that which has been paid over to the defendant Bunner, must be applied towards the satisfaction of those claims which he was entitled to receive; and the complainants are entitled to their indemnity, out of the moneys still remaining in the hands of the executors of Ferrers. Those executors having no interest in the question, they are entitled to their costs out of the fund; and the complainants will, in that case, have their remedy over for those costs, as well as the general costs of the suit, against the other *defendants. But as the administrators of Church ought not to be personally charged with the payment of any costs, and the money in the hands of the executors of Ferrers being sufficient for the purpose, I shall direct that out of the moneys in the hands of such executors, they pay to the complainants the one-half of the net proceeds of the sums received on account of the indemnity of Church upon the brig Eagle, Churchill, master, and upon the cargo of the schooner Dorchester, as stated in the schedule annexed to their answer, after deducting therefrom the share of the expenses and commissions of James A. Hamilton, as specified in the answer of the defendants

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Bunner and wife, and in the schedule thereto annexed; and that the said executors of Ferrers pay those expenses and commissions to the said Hamilton, or to the defendant Bunner, for his use; and that out of the other half or residue of the said net proceeds, the said executors of Ferrers retain their own costs of this suit: and that they also pay to the complainants their costs of this suit to be taxed, and pay over the residue thereof to the defendants, Rudolph Bunner and his wife, as the personal representatives of John B. Church, deceased.

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Byington
v.
Wood.

*BYINGTON v. WOOD.

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Exceptions to an answer are always referred in the first instance to a master. If either party neglects to appear before the master and argue the exceptions, he will not afterwards be permitted to bring them before the court by exceptions to the master's report.

No exceptions can be taken to a master's report, which are not founded upon objections distinctly taken before the master.

In the case of a reference to state an account, the objections to the report are taken and argued after the draft of the report is prepared.

In such cases, objections may be taken by a party who has not previously appeared before the master; but he cannot introduce any new matter in evidence to support such objections.

THIS case came before the court for a hearing upon ex-^{August 5th.} ceptions to a master's report upon exceptions to the answer. The defendant did not appear before the master on the reference to argue the exceptions to the answer.

N. P. Randall, for the complainant.

Wood, defendant, in proper person.

THE CHANCELLOR:—It appears by the affidavits of the complainant's solicitor and the report of the master, that the

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defendant never appeared before him on the reference, to argue the exceptions to the answer; and it is now objected, that under such circumstances, he has no right to except to the master's report.

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It is the practice on the equity side of the exchequer, to refer exceptions to an answer to the court in the first instance; but in the Court of Chancery a different practice prevails. The multiplicity of business in the latter court renders it impossible for the Chancellor to examine the numerous cases of exceptions to answers which must constantly occur. It is for this reason that such exceptions must, in the first instance, be passed upon by a master; and the cases which are brought before the court, by way of appeal from his decision, are comparatively few. The whole benefit of the reference to a master in the first instance will be lost, if the parties are not compelled to appear and litigate the matter before him. *It is undoubtedly the duty of the master, although he proceeds *ex parte*, to examine the subject with as much care as if both parties appeared and contested the matter before him. But every person, at all conversant with the proceedings of courts of justice, is aware that the arguments of counsel materially assist the minds of those who are entrusted with the decision of any matter in coming to a correct conclusion, both as to the law and the facts of the case. Hence it is, that a court of *dernier* resort will not hear and decide any point which has not been distinctly submitted to the court below. And, for the same reason, this court will not permit any exceptions to be taken to a master's report which are not founded on objections distinctly made, and urged upon the consideration of the master. (*Remson v. Remson*, 2 John. Ch. Rep. 495; *Methodist Church v. Jacques*, 3 John. Ch. Rep. 78; *Beame's Orders*, 258; *Hues v. Lawes*, Bunb. Rep. 93.)

In the case of an ordinary reference to take an account, the objections to the report are to be made and urged after the master has prepared the draft of his report; and in such cases, objections may be taken by a party who has not pre-

viciously appeared before the master. (Howard's Equity Side, 40.) But he cannot introduce any new matters in evidence to support such objections. On a reference of exceptions to an answer, the master makes no draft of his report, but the whole matter is argued before the master in the first instance. And if either party neglects to appear and argue the exceptions before him, such party cannot be permitted afterwards to bring them before this court by exceptions to the report of the master. The exceptions to the master's report in this case are, therefore, overruled with costs. But as the defendant has probably acted under a mistake as to the practice, I shall, on his paying the costs of the former reference and of this hearing, direct the original exceptions to the answer to be referred back to the master, that the defendant may have an opportunity to be heard thereon.

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Brown
v.
Lynch.

*BROWN v. LYNCH AND LYNCH.

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Thomas L. and J. L. were owners of a farm in Orange county, which, in 1811, was, by a fraud upon them, mortgaged to R. The mortgage was foreclosed in Chancery, and the farm advertised for sale by a master. Before the sale, B., by an arrangement with Thomas L. and J. L., agreed to purchase in the farm for their benefit, for which he was to receive a stipulated compensation. R., the mortgagee, in order to favor Thomas L. and J. L., agreed with B. that he might bid off the property for \$1,500, about half the amount of the mortgage. B., at the sale, prevented others bidding, by representing that he intended to buy for Thomas L. and J. L. B. purchased the farm at the master's sale for \$1,540, about 1,000 below value. Afterwards B. refused to convey the farm to Thomas L. and J. L., or to account to them for the value, although they tendered to him the amount of his bid, with interest, and the sum agreed to be paid for his services. It was held that B. was a trustee for Thomas L. and J. L., and had no other interest in the farm than that of a mortgagee to secure the repayment of the purchase-money, and the payment of the sum agreed to be allowed him for his services.

It was also held, that a purchaser of the farm from B., with full knowledge of the claim of Thomas L. and J. L., was an incompetent witness for B.

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August 5th.

A court of chancery relieve against a fraud, by converting the person guilty of it into a trustee for those who have been injured thereby.

APPEAL from the Equity Court of the Second Circuit.

The facts in the case, and the reasons for the decree in the court below, are stated in the following opinion delivered by Judge EMOTT in the Equity Court.

OPINION :—The plaintiffs were owners of a farm in Cornwall, in Orange county, which, in 1811, by a fraud upon them, was mortgaged by their brother, Nathaniel Lynch, to John C. Romeyn, of New-York. The mortgage was foreclosed in Chancery, and the lands advertised by a master for sale, on the 29th day of May, 1824. They were sold to the defendant on the 8th day of June, for \$1,540. The farm was, in fact, worth \$2,500, and was sold by the defendant to Benjamin Colter, in March, 1825, for \$2,300. Thus far, the parties agree as to the facts; but in what follows, they are at issue: the defendant denying fully the statement made by the plaintiffs. The plaintiffs alleged that the purchase was made by the defendant under an agreement and understanding between them, that it should be for the benefit of the *plaintiffs; and the defendant having, by management and imposition, obtained the title, he now, oppressively, and meaning to take an undue advantage of the plaintiffs, claims the property as his own, and will neither convey to them, or account to them for the value.

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A further part of the case on the part of the plaintiffs is, that the purchase was made at a reduced amount, and at about half the mortgage rent, with the consent of Romeyn, the mortgagee, to favor the plaintiffs. This averment is, I think, sufficiently made out by the testimony of Benjamin Van Dusen; who says that the defendant, between the postponement and the sale, told him that he had agreed with the holder of the incumbrance for the property at \$1,500, but that it still must be set up for sale; and of James Green, who testified, that before the sale, the defendant told him he had been to New York and bought

the land of Romeyn, who held the mortgage, and that the defendant at the sale, said to Romeyn that he was buying for the plaintiffs, and Romeyn then said it should go for \$1,500. This being so, we are not bound or embarrassed by the decisions about agreements not to bid at public sales.

A combination to prevent bidding at a sale on execution, is held contrary to morality and sound policy, and every contract on such combination is void, as it operates as a fraud upon the debtor and all his other creditors, and opens a door to oppressive speculation. (*Jones v. Caswell*, 3 John. Cas. 29. *Doolin v. Ward* 6 Johns. R. 194. *Wilbur v. How*, 8 John. R. 444. *Thomson v. Davis*, 13 John. R. 112.) If there was an agreement here to prevent bidding at the sale, it was with the assent of the creditor, giving to him the sum he was willing to receive, under the circumstances of the case, from the plaintiffs; and therefore not to his injury or prejudice. It was to save the property of the plaintiffs, and if they had other creditors, to give them the means to pay their debts; and therefore closed the door against speculations, and could not operate as a fraud upon any person. The true questions in this case are, has the fraud been made out? and can the court interfere if the fraud has been committed? The fraud alleged, it must be remembered, is, that the defendant, pretending to be a friend *to the plaintiffs, made arrangements with them and the mortgagee to purchase the property, for which he was to be paid a stipulated compensation; and that he prevented other persons bidding at the sale, or interesting themselves for the plaintiffs. By these means, it is said that he got the property at little more than half its value, and is now attempting to turn the profit to his own account. As to the fraud, Samuel McGill says that he and his father-in-law, Van Duzen, talked about purchasing, and would have purchased, if they had not been informed that the defendant was to purchase for the Lynches. On the morning when the property was to have been sold, the defendant was at the house of the witness, and told him he had the

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evening before agreed with the plaintiffs to go and buy the property for them, and said he thought it would be a shame for any man to come and run it up on them, for they had lived their best days on it, and had a great deal of bad luck, and ought to have the property. Van Duzen, the father-in-law, says that he attended the first day of sale to purchase; that the evening of the day of the adjournment he went to the defendant to ascertain whether he was going to buy for the plaintiffs: the defendant told him he had agreed for the property for the plaintiffs for \$1,500. The witness would have given \$2,500 for the property, but he gave up his intention of bidding on the declaration of the defendant that he was purchasing for the plaintiffs. David Lynch testified, that the defendant called on the plaintiff, Thomas Lynch, the night of the postponement; he said he had agreed for the property, and wanted the plaintiffs to make the title as bad as they could, so that he could buy cheap for them, and prevent others bidding. The defendant said the plaintiffs should have the property, and no one else. It was agreed that the defendant should have \$60 for his trouble. James Green says, that a few days before the 29th of May, the defendant called on him to know whether he meant to bid on the property, and said he thought of buying for the plaintiffs. After the postponement, and before the sale, the defendant again called on him to ascertain whether he intended to bid, and said it would be unkind and unneighborly for him to do so, and that he was buying for the plaintiffs, and had agreed on *the sum with Romeyn. The defendant and the plaintiffs were in frequent private conversation at the sale. John B. Green testified, that the defendant, before the sale, applied to him to know if James Green intended bidding, and said he was going to buy for the plaintiffs, and wished Green not to bid. The defendant said that the title was not good, that he did not want to make anything, and expected nothing but his money. William Atkinson said, that on the day on which the property was first advertised, the defendant told him he had

bought the property for the Lynches, it was a hard case for them and he pitied them. In addition to this, and to show the conduct and the pretended motives of the defendant before the sale, we have the further testimony of McGill, that the defendant, after the sale, said that the coming down of Bridgen, and the claim by him, was under a plan laid by the defendant and the plaintiffs, to prevent people from bidding on the property. Van Duzen says, that after the defendant offered to sell the place, he told the witness it was a plan of his and Thomas Lynch to get Bridgen to come to the sale and claim the property, and that the defendant appeared tickled about it, and laughed, and said the property was about to fall into his hands. And William Southerland testified, that the defendant, after the sale, declared to him that he had said a good deal to prevent others from bidding on the property, and that he did it with a view to help the plaintiffs, and to buy in the lands cheap for their benefit.

There is other testimony which relates to the declarations and the acts of the defendant after the sale. McGill says, that he did not attend the sale on the 8th of June, believing that the defendant was to buy in for the plaintiffs; that a short time, and not more than three weeks after the sale, the defendant said he had bought the property for the plaintiffs for \$1,540, and had charged them \$60 for his trouble, and that the plaintiffs were to pay for the property in the spring. In December the witness applied to the defendant to hire the property, but he declined letting it, as he had bought it in for the plaintiffs, and expected they would redeem it. Van Duzen says, he heard the defendant say several times, that the plaintiffs had a right to redeem by the 1st of April, by paying his bid of \$1,540, with interest, and \$60 for his trouble; and that he had *taken leases from the plaintiffs, and had included in the leases the interest to the 1st of April. Southerland says, that in January or February he called on the defendant to buy the place, who offered to sell to him at \$25 the acre. The de-

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defendant said he had bought the property for the benefit or accommodation of the plaintiffs, if they could raise the money; but they had done a good deal to injure him, and they should not have the land unless they paid the full amount a stranger would pay, and he was sure they could not do that. Lancaster says, that in May or June, 1824, after the purchase, the defendant said he had not bought the land for himself, but that he bought for the plaintiffs, and that he went to the sale on purpose to buy for them; they were to have until the 1st of April to raise the money, but he would not be particular as to the time. The defendant spoke of the interference of Green, and said but for him he would have made a better bargain for the plaintiffs by forty dollars, and he thought it hard of Green that he bid after he knew the defendant was purchasing for the plaintiffs. Cook testified, that in April the defendant told him he bought the property for the plaintiffs, but they had not done as they ought to have done, and now they should not have it. And Taylor says, that he lived with the defendant at the time of the purchase, and once asked him if he meant to let the plaintiffs have the property; he said he did, if they ever got ready to redeem it, and he had told them to go on with their work as usual.

There was much additional testimony, which I have gone over with great care; but I do not think it materially varies the case.

I am satisfied, from all the testimony in the cause, that the defendant went into this purchase under the pretence of aiding the plaintiffs, who had been most grievously injured in the mortgage, and who were to be utterly ruined by it, if the whole amount of the incumbrance was to be exacted; and that he acted by the consent of, and under an agreement with the plaintiffs, who were to rest upon him, and to pay him for his services. I am also satisfied that the defendant, by representing to the mortgagee the hardships of the plaintiffs' situation, and he was acting for them in order to save something to them, induced the mort-

gagee to agree not to bid on the property over \$1,500, or in other words, to receive that sum for his debt, which amounted to much more. And I am further satisfied, that the defendant, by getting the plaintiffs to aid him in casting a slur over the title, and by holding himself out to the world as the agent and friend of the plaintiffs, prevented a competition and bidding at the sale, and had a property struck off to him for \$1,540, which was fairly worth \$2,500, and which he now treats as his own, in defiance of the plaintiffs, and their claim under his agreement. It is apparent, then, that the defendant went into this purchase with fraudulent views, and has obtained a title to the property by trick and contrivance. It is fair for the defendant and for all others to advance their means by speculation or purchase; but they ought not to do it at the expense of honor or honesty, and if they make the attempt, it is at their peril. In this case, I am of opinion that it is established that the defendant has committed a fraud on the plaintiffs, by agreeing to purchase for their benefit, when, in truth, he meant to purchase for himself, in a manner to insure great profits; that he has committed a fraud on the mortgagee, by inducing him to believe that the purchase was for the plaintiffs, and thus prevailing on him to take about half of his debt. And he has committed a fraud on the public by false representations about the title, and of his intentions towards the plaintiffs; thereby preventing a bidding at the sale. It remains to be seen, whether a court of equity has power to correct the fraud. In *Pickett v. Loggon*, (14 Ves. 234,) Lord Eldon says: "It has long been settled that if a conveyance has been obtained by means, which in this court, have the character of imposition, fraud, oppression or undue advantage, the person deriving a title under it is a trustee, and the species of relief is by directing a re-conveyance."

This is according to the doctrine of Lord Hardwicke, in *Barnesley v. Powell*, (1 Ves. 289,) and in *Young v. Peachy*, (2 Atk. 254.) A father having obtained an absolute con-

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veyance from a daughter, in order to answer a particular purpose, afterwards made use of it for another, she was relieved under the head of fraud. Lord Hardwicke, in that case, *says, "There have been a great many cases, ever since the statute of frauds, where a person has obtained an absolute conveyance from another in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud which the court ought to relieve against: the doing it is a *dolus malus*, &c." In *Thynn v. Thynn*, (1 Vern. 296,) a man having made a will, and appointed his wife executrix, the son prevailed on his mother to get the father to make a new will, and to name him as executor, he promising to be trustee only for his mother. Upon the whole matter, it appearing to be as well a fraud as also a trust, Lord Keeper North, notwithstanding the statute of frauds, although no trust was declared in writing, decreed it for the plaintiff. In *Devenish v. Baines*, (Prec. in Ch. 3,) a copyholder, by his will, intending to give the greatest part of his estate to his godson, and the rest to his wife, she persuaded him to nominate her to the whole, promising to give the godson the part designed for him. On a bill filed, she plead the statute of frauds; but the lords commissioners decreed against her; not as an agreement or trust, but as a fraud.

In *Chamberlain v. Chamberlain*, (2 Eq. Ca. Abr. 43,) a son and heir apparent having persuaded his father not to make a will, by which he intended to make certain provisions for younger children, on his promise that they should have such provisions, it was decreed that the defendant should pay the legacies, let the assets be what they might. The same law will be found in *Reech v. Kennegal*, (1 Ves. 125,) in which case Lord Hardwicke says, "It is not necessary that the fraud should be on the person coming for payment alone:" it was here also a fraud on the testator. And in *Drakeford v. Wilkes*, (3 Atk. 539,) it was held that the legatee promising a testator in consideration

of a disposition in the will in her favor, she would do an act in favor of a third person, equity would make her perform. Lord Hardwicke says, that "If there is a declaration and understanding by a legatee to do an act, in consideration of the testator devising to that legatee, he knew of no case where the court had not directed it, *whether such understanding was before the will or afterwards." Of the modern cases, we have *Strickland v. Aldbridge*, (9 Ves. 516,) where, to a bill by the heir against the devisee, alleging that the devise was upon a secret trust or understanding for a charitable purpose, against the statute, a plea of the statute of fraud was ordered to stand for an answer, Lord Eldon saying it was clear that a trust would be created, upon the principle on which this court acts as to fraud. And in *Mestaer v. Gillespie*, (11 Ves. 626,) Lord Eldon says, upon the statute of frauds, although declaring that interest shall not be bound except by writing, cases in this court are perfectly familiar, deciding that a fraudulent use shall not be made of the statute, when this court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even though the statute has declared that in case those circumstances do not exist, the instrument shall be absolutely void.

Upon the authority of these cases, I have no doubt of the power of the court to correct the fraud, and it only remains to consider the best manner of doing it under the circumstances of the case.

The plaintiffs might certainly be permitted by a new bill in the nature of a bill of supplement, to follow the property in the hands of the person who has taken the conveyance during the pendency of this suit; and it is for that reason that I have held him interested, and suppressed his testimony; but this would lead to more delay and expense than would be proper. The short way of ending the controversy will be to declare that the defendant, having committed a fraud as well on the plaintiffs as on Romeyn

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in the purchase, he was therefore a trustee for the plaintiffs, subject to the payment to him of the \$1,540 paid on the purchase, and of \$60, the compensation agreed on; and that the defendant, in making the sale to Benjamin Coulter, acted as the trustee of the plaintiffs, and is answerable to them for the amount of the sale, making the deductions of the two sums before mentioned.

In conformity to that opinion, the following decree was made in the equity court; from which decree the defendant below appealed to this court.

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*“This cause having heretofore been brought to a hearing upon the pleadings and proofs therein, and the same having been argued by Mr. David Ruggles, of counsel for the complainants, and by Mr. George F. Tallman, of counsel for the defendant, and due deliberation being had thereupon, the court doth declare, that the said defendant committed a fraud upon the said complainants, in the purchase of the lands in the pleadings and proofs in this cause mentioned; and that he made such purchase, and received the conveyance of the said lands as trustee for the said complainants and for their benefit; subject, however, to the payment to him of the sum of one thousand five hundred and forty dollars, paid by the said defendant on such purchase, and the sum of sixty dollars, the compensation to the defendant for making the same, agreed upon by the parties, with interest on both sums from the 8th day of June, in the year one thousand eight hundred and twenty-four, the time of making such purchase; and that the said defendant, in making the sale of the said lands to Benjamin Coulter, in the proofs mentioned, acted as the trustee of the said complainants, and is answerable to them for the amount of the sale moneys, being the sum of two thousand three hundred dollars, with interest thereon from the nineteenth day of May, in the year one thousand eight hundred and twenty-five, the time of such sale, making the deductions of the two sums before mentioned; and it appearing to this court, by computation, making the charges and allowances

aforesaid, that there is due to the said complainants from the said defendant, the sum of seven hundred and thirty dollars and two cents, on the day of the date of this decree: It is therefore ordered, adjudged, and decreed, and the circuit judge of the second circuit, by the power and authority of this court, doth order, adjudge and decree, that the said defendant pay to the said complainants or to their solicitor, the sum of seven hundred and thirty dollars and two cents, with interest thereon from this day, together with the complainants' costs in this cause to be taxed, within thirty days after demand made and service of a copy of this decree upon the said defendant; and in default of such payment, that the said complainants have execution for the same."

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**G. F. Tullman*, for the appellant:—Coulter was a competent witness. He had no interest in the event of the suit. *Nelson v. McDonald & others*, 6 John. Ch. R. 201.) The agreement between Brown and the Lynches was void for want of mutuality. It could not have been enforced by Brown. (*Tucker v. Woods*, 12 John. R. 190.) It was also within the statute of frauds. It was not in the character of a mortgage. There was no loan to the Lynches; nor any resulting trust in their favor. The agreement, if there was one, had been rescinded by the Lynches. If there was any fraud, it was perpetrated by Brown and the Lynches in conjunction, with intent to injure the mortgagee. If so, they were *in pari delicto*, and the court would not assist either. If there was an agreement not to bid against each other at the sale, and they were to become partners in the purchase, the agreement was fraudulent, and against public policy. (*Doolin v. Ward*, 6 John. 195; *Thompson v. Davies*, 13 John, 112.) The facts in the cases cited by the circuit judge are not like those in this case. The bill does not meet the respondent's case. The relief given must be according to the case stated in the bill. (Mitf. Pl. 38, 39;

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Wilkin & others v. Wilkin, 1 John. Ch. R. 111; *Hiern v. Mill*, 18 Ves. 119; *Dormer v. Fortescue*, 3 Atk. 132.)

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D. Ruggles and *P. Ruggles* for the respondents:—The agreement between Brown and the Lynches could have been enforced by Brown. The consideration was in his own hands. Brown, after his purchase, became in effect the assignee of the mortgage. The Lynches had the equity of redemption. The rule of *in pari delicto* does not apply to a court of equity. There the different degrees of guilt of parties are inquired into. (*Eden on Injunc.* 16; *Osborn v. Williams*, 18 Ves. 379; *Lord St. John v. Lady St. John*, 11 Ves. 585.) Courts of equity will not permit the statute of frauds to be made an instrument to perpetrate fraud. (*Rob. on Frauds*, 79, 102, 103; *Walker v. Walker*, 2 Atk. 98; *Barrow v. Greenough*, 3 Ves. 152; 2 Desaus. R. 141; *Reigal v. Wood & others*, 1 John. Ch. 406; 1 Cruis. Dig. 485, tit. 12, *Trust*, ch. 1; *Whelan v. Whelan & another*, 3 *Cowen, 537; *Boyd v. McLean*, 1 John. Ch. R. 582. *Clinan v. Cook*, 1 Scho. & Lef. 22.) Part payment alone does not take a case out of the statute. An essential injury must result from not executing the agreement in order to take the case out of the statute. (*Prec. in Chan.* 519; *Rice v. Peel*, 15 John. 508; *Botsford v. Burr*, 2 John. Ch. R. 405.) Where there is a part payment of money, there will be a resulting trust *pro tanto*. Here was a fraud committed by Brown. The mortgagee was not a *particeps criminis*.

THE CHANCELLOR:—A preliminary question has been raised as to the admissibility of the testimony of Benjamin Coulter as a witness for the appellant. Coulter purchased the premises in dispute with full knowledge of the claim of the respondents. He was, therefore, liable to lose the possession of the property which he had purchased, as well as the purchase-money which had been paid, if the plaintiffs in the court below succeeded in their suit.

It is true, he took a bond of indemnity from Brown, and

the decree subsequently made in the cause did not interfere with his right to retain the property. Even if it had appeared that Brown was perfectly solvent and able to indemnify him, it is doubtful whether that would have made him a competent witness; and at the time he gave his testimony, he could not know that the plaintiffs would be satisfied with the personal responsibility of Brown. I, therefore, am induced to think the order of the circuit court suppressing the testimony was correct; but whether it was or was not cannot be very material, as that testimony could not have varied the conclusion at which the judge arrived in relation to the facts of the case.

From the testimony in the case it is satisfactorily established, notwithstanding the denial in the appellant's answer, that he did agree to bid off the property for the respondents, and to give them time to redeem it, they paying him the legal interest of the money, and sixty dollars extra, for his trouble. Such an agreement could be no fraud upon the holder of the mortgage, if, as the appellant's counsel insists, *there were no unfair means used to prevent others from bidding at the sale.

The respondents were not personally liable for the payment of the debt, although it was a lien on their farm. If the mortgagee choose to let it be bid in by them, or by any one in their behalf, for less than its real value, they were perfectly justifiable in procuring some one to bid it off for them. If, on the other hand, the defendant represented truly at the sale, and to several of the witnesses at other times, that the holder of the mortgage had agreed it might go for \$1,500, if it was bid off for the Lynches, they were perfectly justifiable in taking any means in their power to prevent other persons from bidding over that sum for the property. In either case they had an interest in the premises which they had a right to protect and preserve; and it would have been a gross fraud for any one to hold out to them, under such circumstances, that he was bidding off the property for their benefit, when he in fact intended to

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appropriate it to his own use. If the appellant did in fact bid it off for them, under the agreement, he held it in trust for them, and had no other interest in it than that of a mortgagee, to secure the repayment of the purchase-money, and the \$60, agreed to be paid him for his trouble. (*Boyd v. McLean*, 1 John. Ch. R. 582.) But if he had no such intention, and did not in fact bid off the property in trust for them, he was guilty of a fraud which this court will relieve against. The cases referred to by the circuit judge fully establish the principle, that this court has power to relieve against such fraud ; and the means to be employed, is to convert the person who has gained an advantage by means of his fraudulent act, into a trustee for those who have been injured thereby.[1]

There is no ground for the objection that the respondents have rescinded the agreement since the sale. After they ascertained that the appellant intended to defraud them of their property, they did indeed endeavor to induce him to give it up, by circulating reports prejudicial to the title. The leases insisted on by him were executed under the advice of their neighbor, without any intention on their part to relinquish their right ; and there was nothing in that transaction *which could bar their remedy. The supposition, that they ever intended to give up their right to redeem the premises on account of any defect of title, is contradicted by the fact that at the time they were making those declarations they were in pursuit of Brown to tender him the money, and he was keeping out of the way to avoid them.

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I am satisfied the respondents were entitled to the relief claimed by their bill, and the appellant's counsel, on the argument, waived all objection to the particular form in which the relief was given, by decreeing the payment of the profits made by the sale of the land to Coulter, instead of decreeing a reconveyance. The decree of the equity court must therefore be affirmed with costs.

[1] *Flagg v. Mann*, 3 Sumner, 486 ; *Allen v. McPherson*, 1 Phil. 133 ; 5 Beav. 469 ; S. C., 1 H. L. Ca. 191 ; *Hill on Trustees*, 144, n.

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MARSHALL AND OTHERS v. BARCLAY AND OTHERS.

Under the act of Congress of the 2d of March, 1799, the United States are not entitled to a preference in the payment of bonds given for duties, over the general creditors of the debtor, unless the debtor is actually insolvent, and his insolvency is manifested by some notorious or public act.

To entitle the United States to this preference, on account of a voluntary assignment of the property of the debtor for the benefit of his creditors, it must appear that the assignment was of all the property of the debtor, or was made with a view to defeat the claim of the United States.

Where, however, a debtor is actually insolvent, and intending to assign his whole property, first makes an assignment of part for the benefit of some of his creditors, and afterwards makes another assignment of the residue of his property for the benefit of his remaining creditors, the two assignments will be considered as one transaction, and the United States will be entitled to a preference.

ON the 16th July, 1816, John R. Murray and William August 5th.
Ogden, merchants in New York, became insolvent, and stopped payment. At that time, they owed several custom house bonds to the United States, which Major and Gillespie had signed as their sureties. Of those bonds, a part were afterwards paid by Major and Gillespie, and six still remain due and unpaid to the United States.

On the 7th of May, 1817, Murray and Ogden conveyed to T. L. Ogden and B. W. Rodgers the bulk of their real estate, in trust for the equal benefit of all their creditors; and *on the 17th of the same month, the United States recovered judgments against them and their sureties on the custom house bonds. On the 28th of January, 1818, Murray and Ogden assigned all the rest of their property to W. Bayard and H. Barclay, in trust for their creditors generally, provided they should, within nine months, execute releases of their respective demands, and the dividends of those who should refuse, to be paid to the assignors; and on the 11th of November, 1819, they executed an assignment of the dividends for the benefit of those who had not released; provided they should come in and release

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1828. prior to the actual payment of the first dividend of their estate. In July, 1820, they applied for the benefit of the act to abolish imprisonment for debt in certain cases, and in October thereafter were discharged, and assigned all their property to Bayard and Barclay, who were appointed their assignees under the act; and on the 21st December, 1820, T. L. Ogden and B. W. Rodgers, together with Murray and Ogden, by an instrument which recited the previous assignment, for the more prompt and easy distribution of the funds of the estate, released and conveyed to Bayard and Barclay, the assignees under the act, all the property that had been conveyed and assigned to them for the benefit of the creditors of Murray and Ogden generally. In January, 1821, Major and Gillespie assigned all their estate to the complainants, Marshall, Schmidt and Selden, for the benefit of their creditors, and shortly thereafter, Gillespie died intestate.

William Ogden is dead, and the bill has been taken *pro confesso* against his administrator. W. Bayard died after he had answered the bill, and it has been revived against his executors. Henry Barclay, the surviving trustee, has paid into court \$12,650, and has in his hands a further sum belonging to the estate.

B. Robinson, for complainants.

T. L. Ogden, for defendants.

J. Duer, district attorney, for U. S.

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THE CHANCELLOR:—The question presented for the court to determine is, whether, under the act of the 2d of March, *1799, the United States, and the complainants as the assignees of Major and Gillespie, are entitled to a preference in payment of the amount of the bonds which are still due to the United States and those paid by the sureties, over the general creditors of Murray and Ogden. By the 65th

section of that act, (1 Graydon's Dig. 173,) the United States are entitled to a priority of payment, on bonds for duties, in all cases of insolvency, or where any estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased. In another part of the same section it is declared, that the cases of insolvency therein mentioned shall be deemed to extend to cases in which a debtor, not having sufficient property to pay his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors.

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In *Prince v. Bartlett*, (8 Cranch. Rep. 431,) the Supreme Court of the United States decided, that to give a preference, it must not only appear that their debtor was actually insolvent, but that such insolvency should have been manifested by some notorious or public act;[1] as that he had made a voluntary assignment of his property for the benefit of his creditors, or that his property had been attached as the effects of an absconding, concealed or absent debtor. In that case, although the debtor was actually insolvent, and his property had been attached by a particular creditor to satisfy his private debt, agreeably to the laws of Massachusetts, it was held, that the United States were not entitled to any priority, and that the attaching creditor had a lien on the property attached, which could not be defeated by the process subsequently issued in behalf of the United States. And in the case of *The United States v. Hooe*, (3 Cranch, 73,) the same court decided, that to give a priority on account of the voluntary assignment of the property of the debtor for the benefit of his creditors, it must appear that it was an assignment of all the property of the debtor, or that it was made for the purpose of evading the claim

[1] *United States v. Munroe*, 5 Mason, 572; *United States v. Howland*, 4 Wheaton, 108; *United States v. Bank of the United States*, 5 Rob. (La.) 262; *Dias v. Bouchard*, 10 Paige, 445; *Conard v. Atlantic Ins. Co.*, 1 Peters, 396; Story, J., id. 439.

1828. of the United States. (See, also, *Thehusson v. Smith*, 1 Peters' C. C. R. 195; *United States v. King*, Wallace's R. 13.)
 Marshall v. Barclay. *In the case of *Downing v. Kintzing*, (2 Serg. & Rawle's R. 326,) it was decided, that where a man, who was actually insolvent, and has stopped payment, and with a view of assigning his whole property, made an assignment of a part, for the benefit of some of his creditors, and afterwards made an assignment of the residue, for the benefit of his other creditors, the two assignments were to be taken together, and considered as one transaction, and that the United States were entitled to a priority. That case was undoubtedly decided on the principle that the intention of the debtor, at the time he made the first assignment, was to transfer the whole of his property for the benefit of his creditors; and the circumstance, that the assignments were in separate instruments, and executed on different days, was not permitted to change the rights of the parties from what they would have been if the assignments had been executed at the same time and by a single instrument.

In the case before me, if I could come to the conclusion that it was the intention of Murray and Ogden to assign all their property for the benefit of their creditors, at the time they assigned their real estate to Ogden and Rodgers, it would come within the principle decided in the case of *Downing v. Kintzing*. But there is no evidence of any such intent in this case. I do not find it alleged in the complainants' bill; and the answer of Murray to that part of the bill which charges the assignment to have been made for the purpose of defeating the judgments, expressly denies, that at that time they knew or believed the firm was insolvent. That there could not have been any intention of defeating the priority of the United States, appears from the answers of Murray to the original bill, and to the bill of revivor and supplement, in which he swears, that at the time of the first assignment, he supposed they had made ample provision for the payment of all the bonds due from

them for duties, and for which Major and Gillespie were holden as sureties.

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I have, therefore, brought myself to the conclusion, that the assignment of the real estate to Ogden and Rodgers did not entitle the United States, or Major and Gillespie, to a priority, and that the subsequent assignments cannot alter the rights of the parties in respect to that fund. By the assignment *of the lands of Murray and Ogden to trustees, for the benefit of all their creditors, those creditors did not obtain a general, but a specific lien on the lands conveyed, for the payment of their debts, and which could not be divested by any subsequent act of their debtors. As to the property assigned to Bayard and Barclay on the 28th of January, 1818, and in October, 1820, there can be no doubt of the right of the United States to a priority, or of the right of the complainants, so far as the bonds have been paid by Major and Gillespie, or either of them. For the purpose of ascertaining the rights of the respective parties, it will be necessary, in addition to the accounts directed to be taken by the order of the 1st of April, 1828, that an account should be taken of the several persons who were creditors of Murray and Ogden at the time of the assignment of the real estate, and of the amount that is now due to each, including the amount due to the United States on the unpaid bonds and the amount which is due to the complainants as assignees of Major and Gillespie, and distinguishing in that account between what is due on account of bonds paid by Major and Gillespie, and what is due on account of any other dealings between them and Murray and Ogden. And the Master must deduct from the amount paid by Major and Gillespie towards the custom house bonds, any sums which were received by them on account of funds or property placed in their hands specifically for the purpose of being applied to the payment thereof. On the coming in and confirmation of the master's report, under the order of the 1st of April last, and under the decree now to be entered, a proportional part of the costs of

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all the parties to this suit, must be paid out of the funds in the hands of the assignees arising from the first assignment, and the residue out of the fund arising from the other assignments. The fund arising from the first assignment must then be distributed ratably among the creditors for whose benefit the assignment was made, including the United States and the complainants. And out of the funds in the hands of the assignees arising from the other assignments, the United States will be entitled to a priority in payment, for the balance which may be due them, and which shall not be paid out of *the funds arising from the first assignment. The assignees of Major and Gillespie will next be entitled to be paid out of the same the balance due on account of the surety bonds, which they have not received out of the other fund. After that, if any thing remains, the creditors generally will be entitled to payment out of the same ratably, and including any balance that may still be due to the assignees of Major and Gillespie, on any other account than that of the custom house bonds.

NOBLE AND OTHERS v. WILSON AND OTHERS.

The answers of all the defendants in a suit must be perfected before an injunction will be dissolved, provided all the defendants are implicated in the same charge, and the complainant has taken the requisite steps to compel the answers.

And where exceptions to the answer of one of the defendants are submitted to, if the exceptions go to the merits, an injunction will not be dissolved.

The same rule holds where the exceptions are allowed by the master.

If the exceptions to the answer have not been submitted to by the defendant, nor allowed by the master, the court will look into them to see they are not frivolous.

If frivolous, they will furnish no objection to a motion to dissolve an injunction.

Where there is one general exception to the master's report, embracing all the exceptions allowed by him, and the master, in allowing the exceptions

was right as to any of them, this general exception to the master's report will be overruled.

1828.

Noble
v.
Wilson.

August 5th.

THE plaintiffs as judgment and execution creditors of Samuel Wilson, the elder, filed their bill against him and the other defendants, charging that he had fraudulently transferred his property to the other defendants, seeking a discovery of the fraud, and praying an injunction to restrain them from selling or incumbering the property. To the answer of three of the defendants the plaintiffs excepted, and those exceptions were submitted to. To the answer of the other three defendants exceptions were also taken, which, on reference to a master, were allowed; but those defendants excepted to the report of the master. The motion to dissolve the injunction and the argument on the exceptions were heard together.

**P. Ruggles*, for the complainants.

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J. Smith, for the defendants.

THE CHANCELLOR:—The answer of all the defendants must be perfected before the injunction will be dissolved, provided they are all implicated in the same charge, and the complainant has made use of due diligence to get in their answers. In such cases, the exceptions to the answer of one of the defendants submitted to, is a good answer to a motion to dissolve the injunction, if those exceptions go to the merits of the case on which the injunction rests. The same rule must also be applied to the case of exceptions allowed by a master, although the defendant has excepted to the master's report.[1] If the exceptions have not

1] *Depyster v. Graves*, 2 John. Ch. 148; *Vandervort v. Williams*, 1 Clark. 377. This rule is not inflexible; it has its limitations and qualifications. One important one is, that the plaintiff must have taken the requisite steps to compel an answer from all the defendants; *Mallett v. Weyboessel Bank*, 1 Barb. S. C. R. 217; *Labor v. Hess*, 5 Paige, 85. So, where the defendants on whom the real gravamen rests have fully answered; especially where the

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 Noble
v.
Wilson.

been submitted to by the defendant, or allowed by a master, they are no answer to the motion, and the court will look into them, and see that they are not frivolous. If they have been allowed by the court, or a master, or have been submitted to, the injunction will not be dissolved until the answer is perfected, unless the court is fully satisfied that the answer to them cannot have any possible bearing on the question of dissolution.

In this case the defendants are all implicated in a charge of fraud; the exceptions seek a more full discovery of the evidence thereof; three of the defendants admit the exceptions to their answer to be well taken, by submitting to answer them; and the master has reported in favor of the exceptions to the answer of the other defendants. In addition to this, the answers, as they now stand, do not remove all suspicion of fraud in relation to the transactions referred to in the bill. The motion to dissolve the injunction is therefore refused with costs.

I have looked into the bill, the answer of James and Daniel Wilson and Samuel Wilson, jun., and the exceptions to that answer, and am satisfied that all the exceptions are well taken except the second. As to that exception, that there is no charge in the bill to justify the interrogatory on which it is founded. The master's report on the exceptions is therefore confirmed, except as to the second exceptions; and the *defendants must pay the costs of the other exception to their answer, and of the hearing before the master.

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There is one general exception to the master's report, embracing all the exceptions allowed by the master. In eight out of the nine exceptions allowed by the master, it appears the report was right; and according to the decision

co-defendant is a non-resident. *Id.* This, in the text rule, is applicable only where the injunction has been properly granted. *Id.* And the rule is relaxed where the parties not answering, are mere formal parties; *Higgins v. Woodward*, Hopk. 342.

of the Master of the Rolls, in *Hodges v. Solomons*, (1 Cox. Ca. 249,) this exception to the report must be overruled.

1822.

But I think it reasonable to modify the report in the manner above stated; and the defendants must pay to the complainants the full costs of the hearing on the exception.

Fabre
v.
Colden.

FABRE AND WIFE v. COLDEN.

One of two devisees cannot file a bill for an account against one of two executors, where the executors, by the will, have the charge of the real estate, without making the other devisee and executor parties.

Where the husband applies to a court of equity for the control of his wife's property, the court will protect her interests, and make such a decree as is most for her benefit.

THE complainants' bill stated, among other things, that the defendant was the only acting executor of Anthony Marshall, late of the city of New York, who died in January, 1811, leaving two daughters, Rosalia, one of the complainants here, and Catherine. That by the will of the said Anthony, his executors were directed to take charge of the maintenance and education of his said children, until they should attain the age of 21 years; the expenses of which were to be paid out of the rents and profits of his real estate. He also directed that his just debts and funeral expenses, together with two annuities of small amount, should be first paid out of his estate, and devised the residue to his two daughters, to be equally divided between them when they should attain the age of 21 years: and in case of the death of either under age, and without leaving lawful issue, the proportion of such deceased child to go to the survivor. That on the 9th of February, 1828, Rosalia was married to Edward Fabre; since which time, the defendant has *neglected and refused to pay or advance any thing towards her support or maintenance. That she will be 21

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Fabre
v.
Gorden.

years old on the 18th day of May, 1829. That the only charge now upon said estate is an annuity of \$250, and a sum sufficient for the support and maintenance of Rosalia and Catherine. The bill prayed for relief, by decreeing a discovery of the value of said real estate; of what it consists, what the rents, issues and profits of the same are, and have been; and that the complainants may be allowed out of the same, after deducting the annuity of \$250, one-half of the residue, from the 9th day of February, 1828, to the 18th of May, 1829, and for general relief.

The answer admitted the material allegations in the bill; but the defendant further stated, that the personal property of the testator was insufficient to pay his debts; and that, by an order of this court, they had been authorized and directed to apply so much of the rents and profits of the real estate as was not necessary for the support, maintenance and education of the daughters, and payment of the annuities, to satisfy those debts; that there was still an outstanding judgment, against the executors, unsatisfied; that as there were cross remainders, in case either of the children should die before twenty-one without issue, he was advised that it would be unsafe to pay to the complainants one-half of the rents and profits before Rosalia, the wife, arrived at the age of twenty-one. And he submitted himself to the court for advice and direction.

THE CHANCELLOR:—There is no averment in the bill, or admission in the answer, that the husband is not amply able to provide for the support and maintenance of his wife; or that she needs any part of the rents and profits of the real estate in the hands of the executors and trustees for that purpose. She has no legal claim to any thing beyond that, until she is of age; and the executor would be unsafe in paying it to her. Catharine has a contingent interest in the fund; the whole will belong to her if Rosalia should die under age without issue, and no decree can be made in favor of the complainants without making Catharine a party.

Neither *would it be proper to direct an account in this case, except she were a party, together with the other executor who has acted under the will.

1828.

Candler
v.
Pettit.

Whenever the husband applies to get the control of his wife's property through the medium of a court of equity, especially if the wife is an infant, the court will look to her interests, and make such a decree as is most for her benefit.

In this case, if the husband is able to provide for and support his wife, her substantial interest requires that the income of the property should be applied to the payment of the unsatisfied judgment, agreeably to the former order of this court; so that she may receive the property when she becomes of age, unincumbered and free from all claims against it.

The bill must be dismissed with costs; but without prejudice to the right of the complainants to call for an account, &c., when the wife is of age.

CANDLER v. PETTIT AND OTHERS.

If an original bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill, founded upon matters which have subsequently taken place.

Facts which existed before the filing of the original bill, should be inserted therein by way of amendment.

But if the original bill was sufficient for one kind of relief, and facts afterwards occur which entitle the complainant to other or more extensive relief, he may have such relief by setting out the new matter in a supplemental bill.

After a party has proceeded to judgment and execution at law, he may, by the aid of a court of equity, reach property in the hands of a third person, which was not, in itself, liable to execution.

An injunction in such case will also be granted, to prevent the defendant from disposing of his property, after an execution has been issued and returned unsatisfied.

THE complainant filed his bill, setting forth among other things, the pendency of a suit in his favor against the de- August 25th.

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v.

Pettit.

defendant at law, and praying an injunction and *ne exeat*. Both were granted by the master; but the injunction was afterwards dissolved by the Chancellor, on the ground that the complainant was not entitled to an injunction, to stay the defendant from disposing of his property until an execution had been issued and returned unsatisfied. The complainant having proceeded to judgment and execution at law, filed his supplemental bill, stating those facts, and prayed an injunction; on which the court granted a rule upon the defendants, to show cause why the injunction should not be granted, and allowed a temporary injunction in the meantime.

George Brinckerhoff, for the defendants, showed cause, and contended, among other things, that, as there was no ground for the suit, at the time of filing the original bill, the plaintiff could not collect the supplemental bill with it, so as to sustain the injunction on the facts which had subsequently occurred.

R. Sedgwick, contra.

THE CHANCELLOR:—If the original bill is wholly defective, so that no valid decree could be made thereon, the party cannot, by filing a supplemental bill, founded upon matters which have subsequently taken place, sustain the proceedings originally commenced.

If the facts existed before the filing of the original bill, they should be inserted therein by way of amendment. And if the complainant had no ground for the proceedings originally, he should file a new bill, showing a case which will then entitle him to equitable relief. But if his original bill was sufficient to entitle him to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out such new matter in the form of a supplemental bill.

In this case, the original bill was sustainable on the ground that the bail had become insolvent, and that there

was sufficient shown to authorize the issuing of the *ne exeat*. (*Porter v. Spencer*, 2 John. Ch. R. 169.) In such cases the party is not confined to the temporary relief sought, but the court, having gained jurisdiction of the cause for the purpose* of such temporary relief, may retain it generally. (Per *Spencer*, Justice, in *Rathbone v. Warren*, 10 John. Rep. 596.)

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The supplemental bill is therefore properly filed; and I think, on the facts disclosed, the complainant is entitled to the special relief prayed for in the supplemental bill. The cases of *Haddan v. Spader*, in the Court of Errors of this state, (20 John. Rep. 554,) and *Taylor v. Jones*, (2 Atk. Rep. 600,) and *Edgell v. Haywood & Dawe*, (3 Atk. 352,) in the English Court of Chancery, show, that after a party has proceeded to judgment and execution at law, he may by the aid of a court of equity reach property in the hands of a third person which was not in itself liable to execution. I have recently had occasion to declare, in a case which was before me in the Equity Court of the fourth circuit, that "Every person should be permitted to exercise the most liberal and extended discretion as to the time and manner of disposing of his property, vesting the proceeds thereof, and of collecting his debts; provided he exercises that discretion fairly and honestly in reference to the equitable rights of his creditors to be paid out of the same, and without any view or intention of delaying, hindering or preventing them from obtaining their lawful dues and demands. But whenever he exceeds these limits of his legitimate authority and power over his property and funds; whenever there is reason to believe he has exercised that power with intent to delay, hinder or defraud those who have a claim upon that property and those funds for the satisfaction of their just demands, such exercise of power becomes unconscientious and unequitable; and a court of equity will then control and regulate its exercise, in such a manner as to compel him to do justice to his creditors. Such an unconscientious exercise of power by the debtor,

1828. is a fraud upon the creditor." (Opinion in *Weed & Marvin*
 Clark v. *Pierce & others.*)

v. Fisher. The rule for an injunction in this case must be made absolute.

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*CLARK AND OTHERS v. FISHER AND OTHERS.

A person, to be capable of making a will, must be possessed of a sound and disposing mind and memory, so as to be able to make a testamentary disposition of his property with sense and judgment, in reference to the situation and amount of such property and the relative claims of the different persons who are or might be the objects of his bounty.

Where the derangement or loss of the powers of mind some time previous to the making of the will is established, it devolves upon the party who seeks to maintain the will to show that such incapacity had ceased at the time it was executed.

In forming an opinion of the state of the testator's mind, it is proper to take into consideration the reasonableness of the will in reference to the amount of his property and the situation of his relatives.

Whenever a person, whose mind is imbecile from disease, is induced by fraud, imposition, or undue influence, to make a testamentary disposition of his property different from what he would have done in the full possession of his faculties, the same will be set aside.

Surrogates, having exclusive jurisdiction in relation to the proof of wills of personal property, must determine all questions of fraud, imposition and undue influence in procuring such wills, as well as the general question of the capacity of the testator.

August 25th. THIS was an appeal from the sentence and decree of the surrogate of Kings county. A statement of the case is contained in the opinion of the Chancellor.

Wm. Kent and *D. B. Ogden*, for the appellants:—The testator had not sufficient capacity to make a will. His mind was so enfeebled as to render him an easy prey to fraud and imposition. The possession of memory alone is not sufficient to capacitate a person to dispose of his property by will; he must know all his relations, their claims

upon his bounty, and the extent of his property, so as to be able to make a judicious disposition. He must have a sound and disposing mind and memory, so as to be able to make a will with understanding and reason. (Swinb. on Wills, part 2, sec. 3; Moore's R. 759; *Marquis of Winchester's case*, part 6, vol. 3, Coke's R. 23, a.) More mind is required in making a testament than a contract. (2 Evans' ed. of Pothier on Oblig. 589.) The testator presents a case of a broken down, enfeebled, expiring intellect; of a mind reduced to second childhood, with some little glimmering of reason remaining. After the mind is gone in old men, memory often remains; and garrulity is *even evidence of the departure of reason. It is incumbent upon the respondents to show a capacity in the testator to make a will at the time he executed the one in dispute; it having been established that he was incapable at a time previous thereto. (1 Phil. R. 535, 567, 570; 4 Cowen's R. 287.) There was in this case a conspiracy to obtain the will from the testator. He was induced to make it through the undue influence of his wife. A palpable fraud was committed in imposing upon him the beggar girl as his niece. The rule applies, *falsus in uno, falsus in omnibus*.

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D. S. Jones and *P. A. Jay*, for the respondents:—Only collateral relatives contest this will. The wife of the testator has no interest in sustaining it. Her share of the estate will be increased by setting it aside. The disease of the testator only affected his body and not his mind. The evidence as to his capacity is mere matter of opinion. The court should not rely upon the opinions of the witnesses, but upon the facts upon which they found their opinions. Opinions, in a case like this, always vary. The difference arises from the different opportunities the witnesses have of seeing the testator, and from their different abilities. (*Kinlyside v. Harrison*, 2 Phil. R. 454.) The same mind is required in making contracts as testaments. (1 Shep. Touch. 403.)

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THE CHANCELLOR :—This cause comes before this court on an appeal from a sentence and decree of the surrogate of Kings county, allowing and admitting to probate an instrument propounded by the respondents as the last will and testament of John Fisher, late of Brooklyn, deceased. The two Mrs. Clarkes are the nieces and next of kin of the deceased, who left a large real and personal estate. He died in May or June, 1827, being then about 80 years of age. About four years previous to his death, and about one year before the death of his first wife, he had an apoplectic fit, which terminated in paralysis, and continued until his death. He was confined to his bed for the four years, but was able to ride out a few times, being helped into the carriage. His speech was much impaired, but he was at times able to make himself understood by those who were well acquainted with him. In the fall of *1824, he was married to Diana Rapelje, the respondent, a sister of his first wife. The will in controversy was executed in May, 1827, shortly before his death; and he thereby gave all his property, real and personal, to his wife, in fee; but afterwards, in the same will, he gave one-fourth of his property, after the death of his wife, to a supposed daughter of his deceased brother, Lawrence Fisher, and the annual interest thereon for her education, and the remaining three-fourths to the heirs of Eleanor Clarke, Maria Clarke, Ann Smith and Isaac Rapelje. The respondents were made executrix and executor, with a general power to sell. Lawrence Fisher, in fact, died without issue; and the pretended niece was a child which his widow had stolen from the alms house, and claimed as her own.

The appellants insist that the testator was incompetent to make a will, or if not wholly incompetent, that the same was procured by fraud and imposition, and by taking an undue advantage of his situation. Between fifty and sixty witnesses were examined to these questions by the different parties before the surrogate.

The general principles of law in relation to the capacity

of a person to make a will, are well understood. He must be of sound and disposing mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment, in reference to the situation and amount of such property and to the relative claims of the different persons who are or might be the objects of his bounty.[1] (Marquis of Winchester's case, 6 Coke's R. 23. *Den v. Johnson*, 2 South. Rep. 458.) But the great difficulty which generally exists, is in applying these principles to the testimony in each particular case. The evidence of capacity on which the court or jury are to decide in most contested cases, consists in the opinions of witnesses, sometimes with, but frequently without, the particular facts on which such opinions are founded. Such testimony is always the most unsatisfactory, and the least to be depended on. Our opinions are much more frequently founded on prejudices, or biased by our feelings, than we are aware of. Hence it frequently happens that two witnesses, equally honest and intelligent, *form opinions directly opposite to each other, founded on the same state of facts. It is for this reason that the opinions of witnesses are never received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the

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[1] Lord Kenyon, in addressing the jury in *Greenway v. Greenway*, 3 Our time, said—"I take it a mind and memory competent to dispose of his (the testator's) property, when it is a little explained may stand thus: having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had the power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will." As to the standard of mental capacity requisite, see Verplanck, Senator, in *Stewart v. Lispenard*, 26 Wen. 255, 306, 311, 312; *Blanchard v. Nestle*, 3 Denio, 37; *Comstock v. Hadlyme*, 8 Conn. 265; *Kinne v. Kinne*, 9 Conn. 105; *Kachline v. Clark*, 4 Wharton, 320.

To revoke a will requires the same capacity as to make one. *Smith v. Wail*, 4 Barb. S. C. R. 28. Exposition of the doctrine of monomania and partial insanity, as applied to wills, see *Waring v. Waring*, 6 Moore, 341, S. C. & Jur. 947.

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court or jury. And where the opinions of witnesses from the necessity of the case are received as evidence, the weight of testimony will not depend so much upon the number as upon the intelligence of the witnesses, and their capacity to form correct opinions, their means of information, the unprejudiced state of their minds, and the nature of the facts testified to, in support of those opinions.

Testing the case before me by these principles, it is satisfactorily established that at the commencement of the disease of John Fisher, there was a general derangement or destruction of the powers of his mind, so as wholly to incapacitate him to make a will. This is proved by the testimony of his attending physicians; of Robert Lowther, who was with him eleven months in the capacity of nurse; of Bishop Onderdonk, who made him pastoral visits for the purpose of administering spiritual consolation; of Gen. Bogardus, who went to see him several times on business; and of many others who were in habits of intimacy with him before his sickness and who continued to visit him until they supposed his disease incurable and his mind irretrievably gone. In opposition to this, a few persons, of very limited capacity to judge on such matters, testify that he was as capable of doing business during the whole of his sickness as he ever was before.

It being established that there was a general derangement or loss of the powers of mind for a very considerable period some time previous to the making of the will, the weight of proof was thrown upon the respondents to establish the fact that such incapacity had ceased at the time the will was executed. (*Kinlock v. Palmer*, 1 Const. R. S. C. 225. *Lessee of Hoge v. Fisher*, 1 Peters' C. C. R. 163. *Attorney-General v. Parnther*, 3 Bro. Ch. R. 443. Swinburne on Wills, part 2, sec. 3. *Turner v. Turner*, 1 Little's R. 102. *Jackson v. Van Duezen*, 5 John R. 159. Case of Cochrane's will. 1 Munroe's R. 263.)

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*After the first year of his disease, very few of those persons who had known and associated with him previous to

his sickness, and who alone were capable of comparing his mind in its diseased state with what it was before, visited his house. Among the witnesses who did see him during the last three years of his life there is a very great contrariety of opinion as to the situation of his mind, and even as to the state of his corporeal faculties. I think the weight of testimony is that in the summer of 1826 his mental and corporeal powers were in a more vigorous state than they had been during the first two years of his sickness. The testimony of Dr. Watts, in particular, shows that he could then converse intelligibly; and certainly he exhibited considerable strength of memory in relation to the papers of Lord Sterling. That circumstance, though strongly in favor of his mental capacity at that time, is not conclusive. It frequently happens that some particular circumstance has made a strong impression upon the mind of an individual, and has been thought over so often that the memory on that subject becomes in a measure mechanical; and whenever one link in the chain of circumstances is touched, the whole subject again passes through the mind. Hence it sometimes happens in second childhood, when all traces of recent events have become completely effaced from the memory, the bare mention of some occurrence which made a strong impression upon the mind of the individual in early life, will bring the whole subject distinctly to his recollection; and he will be able to detail every circumstance with the most minute exactness. I am, therefore, not perfectly satisfied, considering the nature of the disease under which Fisher was laboring, that even at that time he was of sufficient capacity to dispose of his property by will with sense and judgment.

Whatever may have been his situation in the summer of 1826, there are still stronger reasons to doubt his capacity in May, 1827, when the will was executed. He was not then in a situation to make himself understood by the person who drew it, even in reply to questions put directly to him. The will was drawn under the direction of the wife,

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v.

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the principal devisee; and although she professed to *converse with and to understand him, the scrivener had no means of knowing whether he assented to her propositions or not, or whether he understood what was said to him, or what business was transacting. If his mind had been once partially restored, there is reason to believe he was then suffering from another attack of the same disorder, and which carried him off within a few days afterwards. Besides, the will itself is unreasonable on its face, when taken in connection with the amount of his property and the situation of his relatives; and this is always proper evidence to be taken into consideration in judging of the state of the testator's mind. (*Patterson v. Patterson*, 6 Serg. & Rawle's Rep. 56.)

But if it were doubtful whether the testator's mind was so far impaired as to render him incapable of making a valid will, there cannot be a question that it was so much weakened, and rendered so imbecile by disease, as to make him an easy dupe to the arts and intrigues of those by whom he was surrounded. Whenever a person in that situation is induced by fraud, imposition, or undue influence to make a testamentary disposition of his property differently from what he would in the full possession of his faculties, the same will be set aside, upon the same principle that a court of chancery sets aside a conveyance of property obtained under like circumstances.

Surrogates having exclusive jurisdiction in relation to the proof of wills of personal property, they must of necessity determine all questions of fraud, imposition, and undue influence in procuring such wills, as well as the general question relative to the capacity of the testator. (*Kerrich v. Bransby*, 3 Bro. P. C. 358; *Bennet v. Wade*, 2 Atk. R. 324; *Archer v. Mosse*, 2 Vern. 8; *McDowell v. Peyton*, 2 Desaut. 313; 1 Roberts on Wills, 30.)

In the case of the will of Edward Campion, a court of delegates, consisting of some of the most distinguished judges and civilians in England, set the will aside on the

ground that undue influence had been exercised over the mind of the testator by his housekeeper and physician; and Lord Rosslyn, being satisfied with their decision, reported against granting a commission of review. (*Ex parte Fearon*, 5 Ves. 683.) *In *Hacker v. Newbern*, (Styles' R. 427,) Rolle, C. J., held, that a will executed by a man in his last sickness, by the over importunity of his wife and for the sake of quiet, was not valid. In *Dietrick v. Deitrick*, (5 Serg. & Rawle's R. 207,) on an issue to try the validity of a will, the person attempting to impeach it on the ground of imbecility and imposition, was permitted to give evidence of the false representations of the principal devisee, as to the character of the wife of another who was equally entitled to the testator's bounty, by reason of which he was disinherited. The same principle is recognized in *Nussear v. Arnold*, (13 Serg. & Rawle's R. 323.) And in *Patterson v. Patterson*, (6 Idem. 56,) where it was attempted to impeach a will on the ground of imbecility of mind, connected with fraudulent practices by the devisees, the party was permitted to give in evidence the situation of the testator's family connections and property, for the purpose of showing the unreasonableness and injustice of the provisions of the will.

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Applying the principles of these cases, and the doctrine held by the Court of Errors in *Whelan v. Whelan*, (8 Cow. R. 537,) to the circumstances disclosed by the testimony before the surrogate, this will must be set aside, as unduly obtained by taking advantage of the situation and infirmities of this bed-ridden, paralytic old man, by which a different disposition was made of his property from that which would otherwise have taken place. The testimony of Robert Lowther shows, that immediately after the death of the first Mrs. Fisher, her relations commenced a system of intrigue and management for the purpose of getting the control of the person and property of the testator. For this purpose his niece, who had been in the habit of visiting him previously, was virtually excluded from the house;

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and means were taken to prejudice the testator against her, by representing in his presence and hearing, that her visits and attentions to him were mercenary. They urged him to get married, as a means of restoring him to health; and the sister of the first Mrs. Fisher was placed about him, and recommended as a suitable person for his wife. In the course of a few months, he was induced to consent to the ceremony of a marriage, which in his situation *never was or could be consummated. Having thus secured the control of his person, a wife was secured for the lunatic brother, and he was importuned to get the testator to make a will in their favor; and after the death of that brother, his widow procured from the alms house a child which was imposed upon the testator as his niece. Although there is no direct evidence of the fact, yet from the intimacy which had existed between the widow of Lawrence Fisher and the respondent Diana Fisher, there is reason to suspect the latter was not ignorant of the deception which was practiced. The testator was then induced to execute this will, giving one-fourth of his property to the supposititious niece, and the residue to his wife for life, with power to her and the co-executor to sell and dispose thereof as they pleased, and what was left after her death was to be equally divided among the children of his nieces, and the descendants of two of her own relations; thus, without any apparent cause, excluding the two Mrs. Clarkes, who were his only blood relations, from any share in his property.

On either of the grounds taken by the appellant's counsel, I am satisfied the sentence and decree of the surrogate, allowing the instrument propounded as the last will and testament of John Fisher and admitting the same to probate, was erroneous; and the same must be reversed.

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v.
Rosevelt

FULTON AND OTHERS v. ROSEVELT.

Where the person who prosecutes a suit in the name of an infant, as his next friend, is insolvent, he will be compelled, on the application of the defendant, to give security for costs.

A suit may be commenced in the name of an infant without his knowledge or consent. The court, however, on a proper application, will refer it to a master to ascertain whether such suit is for the benefit of the infant and if the master reports that it is not for his benefit, will stay the proceedings. A suit cannot be brought in the name of a feme covert without her consent; and when brought with her consent, the *prochien amy* may be changed on her application, the person substituted giving his security for the costs already accrued.

*It seems an infant, who has no means of indemnifying a responsible person for costs, will be permitted to sue by his next friend in *forma pauperis*. [1] The court however will, in the first place, see there is probable cause for the proceeding, and will appoint a proper person as *prochien amy*.

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On an affidavit that the *prochien amy* was insolvent, and August 25th. that the suit had been commenced by him without the knowledge of the infant, a motion was made on the part of the defendant to change the *prochien amy*, or that all proceedings be stayed until security for costs was given.

J. Rosevelt, for the motion:—If the defendant is entitled to costs he may have an attachment for them against the *prochien amy* or guardian; (1 Str. 548; Barnes, 128;) or, it seems, he may sue out execution, even a *ca. sa.* against the infant himself, whether he have sued by *prochien amy* or not. (2 Str. 1217; 13 East, 6.) If the *prochien amy* or guardian be not responsible, the court will order the appointment of another person in his place. (2 Str. 708.) A *prochien amy* must be a person of substance, because he is liable for costs. (1 Atk. 570; 3 Bac. Abr. 619; Wyatt, 223.) In the case in 2 P. Wms. 297, the motion was to

[1] Leave to defend will not be given, until a guardian *ad litem* is appointed. *Matter of Byrne*, 1 Edw. 41.

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 Fulton *chien amy* named, which motion was refused. But the
 v. application there was not made until the defendant had
 Roosevelt. answered, and the plaintiff was also a feme covert.

M. C. Patterson, for the complainants:—A bankrupt complainant cannot be compelled to give security for costs. The court will not remove a *prochien amy* who is in indigent circumstances. (*Squirrel v. Squirrel*, 2 Dickens, 765; 1 Ves. jun. 409; 2 Peere Wms. 297; 1 Str. 708.) A bill may be filed by a *prochien amy*, without the consent of the infant.

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THE CHANCELLOR:—It is not necessary for the person prosecuting a suit in the name of infants, to show that the same was commenced with their knowledge or consent. Any person may bring a suit in their name, as their next friend, because he does it at his peril. (*Andrews v. Cadock*, Prec. in Chan. 376.) The only check upon this general license *is, that on a proper application the court will refer it to a master to inquire whether such suit is for the benefit of the infants; and if the master reports that it is not for their benefit, or that it is not for their interest that it should be prosecuted by the particular person who has instituted the suit, the court will order the proceedings to be stayed. (*Dacosta v. Dacosta*, 3 Peere Wms. 140; *Sullivan v. Sullivan*, 2 Mer. Rep. 40.) In this respect it differs from a suit brought in the name of a feme covert. Such a suit cannot be brought without her consent; and when brought with her consent, the *prochien amy* may be changed on her application, the person substituted giving security for the costs already accrued. (*Lady Lawley v. Halpen*, Bunb. Rep. 310.)

The important question in this case is, whether a person who is insolvent and wholly irresponsible shall be permitted to prosecute in the name of infants without giving security for the costs to which the defendant may be subjected. In the case of *Squirrel v. Squirrel*, (Dicken's Rep.

765, 2 Peere Wms. 297 note, S. C.,) cited by the complainant's counsel, Lord Hardwicke refused to stay the proceedings in a suit by a feme covert against her husband, on an affidavit that the *prochien amy* was insolvent. But in that case, the application was not made till after the answer of the defendant was put in; which, of itself, was a sufficient answer to the application for security for costs. (1 John. Ch. Rep. 202; 3 John. Ch. Rep. 520.) And Lord Thurlow afterwards intimated that an infant might prosecute by a next friend who was insolvent. (Anonymous, 1 Ves. jun. 409.) Neither of these cases are binding as authority upon this court. On the contrary, all the cases before the revolution hold a different language. In the case of *Wale v. Saller*, (Moseley's Rep. 47,) the Master of the Rolls required a *prochien amy* who was insolvent to give security for costs; and it was there said a similar order had been made the preceding day by the Lord Chancellor. The same principle was afterwards recognized by him in another case, although he refused to require security merely because the next friend was privileged from arrest. (Anonymous, Mosely's Rep. 86.) And in a subsequent case, at the roll, it was held that *it was not necessary the next friend should be a relation, only a person of substance, because he was liable for costs. (Anonymous, 1 Atk. Rep. 570.)

Perhaps, in a proper case, on an application to the court, an infant who had no means to indemnify a responsible person for costs, might be permitted to sue by his next friend, *in forma pauperis*. I see no objection to such a proceeding, though Lord Eldon intimated it could not be done. But in such a case the court would, in the first place, see that there was probable cause for the proceeding, and appoint a proper person to prosecute the suit as *prochien amy*.

In this case, the next friend must give security to the defendant to answer the costs of the suit, in such sum and with such sureties as shall be approved of by one of the masters of this court, within thirty days after notice of the

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v.
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1828. order, or the bill must be dismissed; and in the meantime,
 De La Vergne all proceedings therein must be stayed until such security
 v. is filed.
 Evertson.

DE LA VERGNE *v.* EVERTSON AND OTHERS.

A payment on a judgment discharges the lien on the land to the extent of the payment; and the lien cannot be restored by any subsequent agreement between the parties.

As between different creditors, equality is equity.

And where there are several judgment creditors, and the land is sold under a prior mortgage, the holder of the eldest judgment, as against the others, has no greater lien upon the surplus moneys than he had upon the equity of redemption before the sale.

If the judgment creditors are equitably entitled to interest as against the debtor, but have no right to collect on their executions against the land, the principal of their judgments must be first paid out of the fund according to their priority, and if any thing remains, it can be applied to the payment of the interest on the several judgments ratably.

No decree will be made for the distribution of a fund in court, unless all the parties interested in the fund are brought before the court.

Where a bill is unnecessarily filed without the direction of the court, in a case where the relief prayed for might have been obtained by petition, the complainant will not be entitled to costs.

So where the defendant in his answer sets up an unfounded claim, costs will in most cases be denied him.

[*182] *THE bill in this cause was filed by one of the defend-
 August 29th. ants to a suit of foreclosure, against a co-defendant and
 others, claiming a part of the surplus moneys arising from
 a sale of the mortgaged premises. It was heard on excep-
 tions to the report of a master.

J. Brush, for complainant.

J. Tallmadge, for defendants.

THE CHANCELLOR:—Three hundred dollars having been paid by John De La Vergne on the judgment to Tabor, the

lien on the land was discharged to that extent, and could not be restored by any subsequent agreement between the parties. (*Marvin v. Vedder*, 5 Cowen, 671.) The master has properly deducted that sum from the judgment lien upon the land. The assignee of the judgment can have no better equity as against third persons than Tabor had before the assignment.

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Eversten.

Previous to the act of the 13th April, 1813, the plaintiff could not levy interest on a judgment, except it was on a penalty, and the amount ordered to be levied, including the interest, was within the penal sum. In *Watson v. Fuller*, (6 John. R. 283,) the Supreme Court decided, even where a judgment was reduced by payments, that the plaintiff could not levy interest, although within the nominal amount of the original judgment. And in *Mason v. Sudam*, (2 John. Ch. Rep. 172,) Chancellor Kent held that a judgment recovered previous to April, 1813, was not a lien on mortgaged premises for the interest, as it could not be levied under an execution.

As between different creditors, equality is equity; and if there are several judgment creditors, and the land is sold under a prior mortgage, the holder of the first judgment, as against the others, has no greater lien upon the surplus moneys than he had upon the equity of redemption before the sale. If the judgment creditors are equitably entitled to interest as against the debtor, but have no right to levy it on their executions against the land, the principal of their judgments must be paid out of the fund according to their order of priority; then if any thing remains, it may be applied to the payment of interest on the several judgments ratably. The *master was therefore right in not casting interest on the Tabor judgment previous to the sale under the mortgage.

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The complainant has unnecessarily filed a bill in this cause without the direction of the court, when he might have settled these questions by a petition in the original suit for an equitable distribution of the surplus moneys;

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v.
Rogers.

he is, therefore, not entitled to costs. Evertson having set up an unfounded claim to the whole amount of the Tabor judgment and the interest, is equally in fault.

As the assignee of the Schuyler judgment is not before the court, no decree can be made in this cause for the distribution of the fund. The bill ought therefore to be dismissed without prejudice to the rights of the parties to petition in the original suit, for an equitable distribution of the surplus. But as the parties have expressed a wish that their rights might be decided in this suit as between themselves, there must be a decree confirming the report of the master and declaring the rights of the parties on the principles above stated, and without prejudice to the rights of the owner of the Schuyler judgment. And leaving them to apply by petition for the surplus moneys, agreeably to their rights as thus declared, when the claim of the other party in interest can be examined and settled.

ROGERS AND OTHERS v. ROGERS AND OTHERS.

A suit in a state court will not be removed into the Circuit Court of the U. S., unless the latter court has jurisdiction of the subject matter of the suit, and has the power of doing substantial justice between the parties.

Where N. R. commenced suits at law in the Superior Court of the city of New York, against H. R., and H. R. filed a bill in Chancery to obtain an injunction restraining the proceedings at law, it was held, that the suit in Chancery could not be removed into the Circuit Court of the United States, inasmuch as such a removal would leave H. R. without remedy; the Circuit Court of the United States having no power to restrain the proceedings at law.

A citizen of one state becomes a citizen of any other state, when he makes such other state the place of his actual residence.

September 1st. THE defendants, who were the executors of Fitch Rogers, late of the state of Connecticut, deceased, commenced suits at law in the Superior Court of the city of New-York,

against the complainants, on notes given to the testator: which suits *are still pending. The complainants set up an equitable defence to those suits, and the bill in this cause was filed for the purpose of obtaining an injunction to stay the proceedings at law. The defendants in this suit presented their petition stating that they were all citizens of the state of Connecticut; and prayed for the removal of this cause into the Circuit Court of the United States. The application was opposed on an affidavit that one of the executors was a resident citizen of this state, and he had a store, and was doing business as a flour merchant in the city of New York, and that he actually resided there at the commencement of this suit, although his family resided in Connecticut.

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v.
Rogers.

R. Sedgwick, for the petitioners.

J. Duer, for the complainant.

THE CHANCELLOR:—From the facts disclosed in the petition and opposing affidavit, it is doubtful whether the defendant Holley was not a citizen of the same state with the complainants when this suit was commenced. Under the constitution of the United States, a citizen of any one state becomes a citizen of any other in which he resides. The question of residence or domicile is frequently one of great doubt and difficulty, depending on a variety of facts and circumstances; and if the removal of this cause depended on that question alone, it might be necessary to have a reference, for the purpose of ascertaining whether Holley was a resident of New York or not, at the time the subpoena in this cause was served. But on examination, I am satisfied the other objection made by the complainants' counsel is unanswerable. Congress never intended to authorize the defendant to remove any suit or proceeding before a state court, unless the Circuit Court of the United States had jurisdiction of the subject matter of such suit,

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and had the power to do substantial justice between the parties. In this case, the foundation of the suit is the inequitable prosecution of the suits at law against the complainants in the state court; and the relief sought is a perpetual injunction to stay those proceedings. By the commencement of the suits at law, the state courts have gained jurisdiction over the subject matter thereof, and *the courts of the United States have no jurisdiction to restrain the petitioners from proceeding therein, or to decree a perpetual injunction, so as to prevent them from collecting the judgments which may be obtained in those suits. The effect of a removal of this cause, therefore, would be to leave the complainants without remedy.

Although this suit is in form an original proceeding, yet in fact it is only an equitable defence to the suits brought by the executors in the state court. This principle is recognized by Chief Justice Marshall in *Sims v. Guthrie*, (9 Cranch, 25.) And in the case of *William Cobbett*, (3 Dallas, 467,) the Supreme Court of Pennsylvania held that an action of debt on a recognizance for good behavior, although within the letter of the law of the United States authorizing the removal of causes, was not within its spirit and intent.

If the petitioners were not willing to trust their rights to the decision of the tribunals of this state, they should have brought their suits in the United States Court, and the complainants would then have been compelled to resort to the same tribunal for the purpose of interposing their equitable defence. Having resorted to the state court for justice, they must be content to take such measure of justice as the law and equity courts of this state mete out to them. The petition must be dismissed with costs.

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WOOLCOCKS v. HART

Where a creditor has a lien upon two funds for the payment of his debt, Chancery will not compel him first to exhaust the fund which a junior creditor cannot reach, if the senior creditor will thereby be injured, or if he offers to substitute the junior creditor in his place on being paid the amount of his debt.

IN this case the complainant was a judgment and execution creditor of James Dreamer. The defendant had also an older judgment and execution against the same person, and Dreamer had not sufficient property in this state to satisfy both. The defendant had also an assignment of certain real and personal property in New Jersey as collateral security for *his debt, which in his answer he alleged was subject to a prior mortgage, and that the title thereto was doubtful. The complainant applied to him to delay a sale under his execution, and apply the Jersey security in the first place in satisfaction of his debt. This was declined by the defendant, but he offered to assign his judgment and all the collateral security which he held over to the complainant, if he would pay the amount due to him on the judgment, which amount he offered to warrant to be due. The complainant declined this offer, and filed his bill, and obtained an injunction. Sept. 4th.

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The defendant now moved to dissolve the injunction.

C. F. Grim, for the complainant, contended, that where a creditor has two funds as a security for one debt, equity will compel him to resort first to that fund on which a junior creditor has no lien; that this was not a mere right of redemption and substitution belonging to the junior creditor, but a right of compelling the senior creditor first to exhaust the fund which the junior creditor could not reach; that this being the rule in equity, the complainant was not bound to pay to the defendant the amount of his judgment

1828. against Dreamer, and to take an assignment of that judgment, and also of the collateral security the defendant held upon the property in New Jersey. The counsel cited *The York and Jersey Steamboat and Ferry Company v. The Associates of the Jersey Company*, (1 Hop. Rep. 460;) *Evertson v. Booth*, (19 John. Rep. 486;) *Hays v. Ward*, (4 John. Ch. Rep. 123.)

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J. Anthon, for the defendant:—Where a creditor has a lien upon two funds for the payment of his debt, Chancery will not, upon the application of a junior creditor who has a lien upon one of the funds, compel the senior creditor first to exhaust the fund which the junior creditor cannot reach, if the senior creditor will be injured thereby, or if he offers to substitute the junior creditor in his place, on being paid the amount of his debt. When the sufficiency of the fund to which the junior creditor cannot resort is doubtful, or the senior creditor refuses to run the hazard of obtaining satisfaction of his debt out of that fund, equity will not take from *him any part of his security until his debt was paid. These principles are fully settled in *Evertson v. Booth*, (19 John. Rep. 492,) *Brinckerhoff v. Marvin*, (5 John. Ch. Rep. 328,) and they apply to the present case. Here the fund which the junior creditor cannot reach is doubtful; the principal creditor declines to resort to it; injustice would be done by compelling him to do so; and he offers to substitute the junior creditor in his place on being paid his debt; which offer is refused by the junior creditor.

THE CHANCELLOR:—Under the circumstances of this case the defendant was not obliged to delay the collection of his debt until he could apply the proceeds of the Jersey property. The assignment of the Jersey property, although absolute on its face, was only a mortgage, and of course no good title can be given until a foreclosure of the equity of redemption against Dreamer. It would be inequitable for this court to compel him to submit to that delay when he

offers to give to the complainant all the benefit which can be derived from that collateral security, by assigning it to him, together with the judgment, on receiving the amount which he is entitled to collect immediately by a sale on his execution.

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The injunction must be dissolved, unless the complainant, within ten days after service of a copy of the order to be entered in this case, pays to the defendant or his solicitor the amount of the defendant's execution and interest on the terms of the offer contained in the answer.

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Where a party delayed a year and six months in applying to the Chancellor to correct a mistake made in drawing up a decree, leave to amend the decree was refused.

The personal property of a testator must be first exhausted in the payment of his debts, before his real estate can be resorted to for that purpose. But where there is a specific lien on the land devised, as in case of a mortgage; or where the land is devised upon the condition of paying the debts: or where the debts are directed to be paid out of the estate devised; in these cases the real estate will be first resorted to, to discharge the debts. So where it is apparent from the will, the testator's intention was, that the legacies should be paid entire and the debts discharged out of other funds, the court will carry such intention into effect.

A judgment is not a specific lien upon the real estate of the debtor.

Where the will of the testator contains no directions as to the payment of debts, chattels specifically bequeathed must be applied to the payment of a judgment against a testator before resort is had to the real estate devised.

A trustee in the possession of land is required to account to the *cestui que trust*, not only for the rents and profits actually received, but also for the rents and profits which might have been received.

THE statement of this case is contained in 1 Hopkins' Sept. 8th. Rep. 515, and in the opinion of the Chancellor.

S. A. Foot, for the complainant :—The complainant is not too late to move to amend the decree. The personal prop-

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erty specifically bequeathed must be first applied to satisfy the judgment in favor of the defendant Halsey Rogers, before resort can be had to the lands specifically devised. (*McKay v. Green*, 3 John. Ch. R. 56; *Livingston v. Livingston*, 3 John. Ch. R. 148; *Livingston v. Newkirk*, 3 John. Ch. R. 312.) Halsey Rogers should be charged not only with the rents he did receive, but also with those he might have received. He also ought to pay the costs of this suit. Trustees, although only chargeable with negligence, are liable to the payment of costs. (*Caffrey v. Darby*, 6 Ves. 488.)

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J. Lansing, for the defendant Halsey Rogers:—Whether personal property specifically bequeathed is to be resorted to for the payment of debts in preference to the real estate devised, depends upon the intention of the testator to be ascertained from the whole will. Personal property specifically *bequeathed, should only be required to contribute ratably with real estate specifically devised, in the payment of debts. (Toller, 419; 8 Com. Dig. 586, last ed. tit. *Devise*; *Evelin v. Evelin*, 2 Pr. Wms. 659; *Hamilton v. Worley*, 2 Ves. jun. 62; *Philips v. Brydges*, 3 Ves. 120; *Waring v. Ward*, 5 Ves. 670; *Waring v. Ward*, 7 Ves. 332; *Smith v. Smith*, 4 John. Ch. R. 449; 1 Brown Ch. Cas. 457.) The defendant being an executor and having acted with good faith, is entitled to costs out of the fund. (*Moses v. Murgatroyd*, 1 John. Ch. Rep. 473; *Smith v. Smith*, 4 John. Ch. Rep. 449.) A purchaser is exempt from costs where a sale is set aside for implied fraud. (4 John. Ch. Rep. 608; 1 John. Ch. Rep. 153; 3 Pr. Wms. 803; 3 Brown's Ch. Cases, 25.)

THE CHANCELLOR:—The application to amend the original decree in this cause, if it had been made in time, might have been allowed, provided there was an obvious omission or mere mistake in drawing up the decree. If the complainants ever had any remedy of this kind, which is somewhat doubtful as to part of their claim at least, it has been lost by

delay. They were apprized of the supposed mistake in the decree, and their attention was particularly called to it, as early as March, 1827, when the objections were made to the draft of the master's report. The same was again brought distinctly to their notice by the exceptions to the report, and the argument of those exceptions before the late Chancellor. At all events, they should have applied immediately after the decision of the Chancellor allowing those exceptions, on the express ground of the omission in the decree which is now alleged to have been by mistake. If it was an obvious mistake, the counsel who had then the management of the cause were bound to notice it, and have the mistake corrected. If it was not obviously wrong, and a clear mistake of the Chancellor or the counsel in drawing up the decree, it could only be corrected on a rehearing. The motion to amend must therefore be denied. Neither is the party entitled to the items rejected by the allowance of the exceptions, under the supposition that they are included in the equity reserved under the original decree. It was the *intention of the Chancellor to have everything relating to that subject embraced in the account taken under the reference which was then made.

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The question whether the personal property specifically bequeathed is to be applied in satisfaction of the judgment before the lands specifically devised can be resorted to, was reserved by that decree, and will now be disposed of. The personal property is the primary fund for the payment of the debts of the testator; and, as a general principle, must be exhausted before the lands can be resorted to for that purpose.[1] It is not necessary to examine the question whether the executor was bound to apply the personal property specifically bequeathed to his mother, in satisfaction of the judgment, in preference to the lands which de-

[1] *Hoes v. Van Hoesen*, 1 Comst. 120; *McC Campbell v. McC Campbell*, 5 Litt. 95; *Hull v. Hull*, 2 McCord, Ch. 302; *Stewart v. Ex'r of Carson*, 1 Desaus. 500, 513. See further Am. Ch. Dig. by Waterman, tit. *Assets*.

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scended to the heirs generally, as the amount of both will be insufficient for that purpose.

Where there is a specific lien on the land devised, as in the case of a mortgage, or where the land is devised on condition of the payment of debts, or the debts are directed to be paid out of the estate devised, and where it appears from the will, that it was obviously the intention of the testator that the legacy should be received entire, and the debts paid out of other funds, the court will marshal the property in such manner as to carry that intention into effect. But a judgment is not a specific lien upon anything. It is a general lien upon all the property of the debtor; [1] but it cannot be enforced against the real estate until the sheriff has sold the personal property. If the testator specifically bequeaths his chattels to one person, and devises his real estate to another, without any directions as to which property shall be appropriated to satisfy an existing judgment against him, the personal property must first be applied to that object. In this case, the personal property specifically bequeathed must be applied towards the judgment debt, before any resort can be had to the lands which went to the devisees under the will; and interest must be cast upon the amount thereof as ascertained by the master. Unless Halsey Rogers elects to take the lands which descended to the heirs at law, at their value as settled by the master, they must be sold, and the *proceeds thereof also applied to diminish the amount reported due on the judgment. And on the confirmation of the report of that sale, the master must apportion the balance still remaining due, upon the several parcels of land specifically devised, in proportion to their present value, exclusive of improvements made thereon since the death of the testator. But as the widow of the testator received the life estate in the 75 acres devised to her, in lieu of her dower in the lands devised to the other

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[1] *Haleys v. Williams*, 1 Leigh, 140; *Morris v. Mowatt*, 2. Paige 586; *Edmeston v. Lyde*, *post*, 637.

persons named in the will, and has never claimed dower in those lands, the value of her life estate in the seventy-five acres at the death of the testator, must be deducted from the present value of the lands devised to Halsey Rogers in making such apportionment.

After the master had ascertained the amount chargeable on the lands devised to Thomas Rogers, jun., and his children, he must state an account between the devisees thereof, and Halsey Rogers, crediting the latter with the amount thus ascertained to be chargeable thereon, and charging the value of the timber cut by him, or by his permission or directions, and the rents and profits received, or which might have been received by him; and charging interest as directed in the former decree. And on confirmation of the master's report, if a balance is found due from Halsey Rogers, he must pay that balance into court for the benefit of those devisees; and if there is still a balance due to him, the land must be sold to satisfy that balance.

Upon the principles and grounds on which the original decree in this cause was made, the complainants are entitled to recover against the defendant, Halsey Rogers, their costs of this suit to be taxed, excepting the costs of their application to amend the original decree, and such other costs as have heretofore been disposed of in the progress of the suit.

As to the lands devised to the other defendants, after the amount of the judgment debt, which is justly chargeable on such pieces of land respectively, shall have been ascertained by the master, Halsey Rogers, or either of those devisees, must have liberty to go before the master and have an account taken in relation thereto, on the same principles *as those on which the account is directed to be taken in relation to the lands devised to Thomas Rogers, jun., and his children; to the end that on the coming in of the master's separate report as to that account, a decree may be made for the sale of the land, or of such parts thereof as may be necessary to satisfy the amount of the judgment justly charge-

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able thereon. And the costs of taking those accounts, and of the separate report, and all other questions and directions in relation to those lands, must be reserved until the coming in of that separate report.

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Where a mortgage has been executed by the husband and wife, she can only be endowed of the equity of redemption.

Where the owner of the legal estates takes an assignment of an outstanding mortgage, there will be no merger of the mortgage unless the owner of the legal estate so intended when he purchased the mortgage.

If the owner of the legal estate purchases in a mortgage executed by both husband and wife, with the intention of protecting himself against the claim of dower to the extent of that incumbrance, the widow can only be endowed of the equity of redemption, and she is bound to contribute her share towards the payment of the mortgage.

A defendant continues seized of his real estate sold under a judgment and execution, until the time for redemption expires; and where he dies before the time for redemption expires, his widow will be entitled to arrears of dower.

Arrears of dower against the purchaser of the premises in which dower is claimed, can only be recovered from the time of the purchase.

Where there is an outstanding mortgage upon the premises, the arrears of dower will be computed by deducting from one-third of the rents and profits, over and above the necessary repairs, taxes, &c., one-third of the interest on the amount due on the mortgage at the time the defendant acquired title to the premises.

If a widow makes application for her dower before she files her bill, and it is refused, she will be entitled to costs: but where she neglected to make such application, and in her bill alleged that an outstanding mortgage was paid off, and insisted upon her right to be endowed of the whole premises, and claimed arrears previous to the purchase of the defendant, and the decree was against her upon all these points, no costs were allowed to either party.

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Sept. 10th.

ON the 20th of February, 1822, John Russell, the husband of the complainant, was seized in fee of a house and lot in the city of Albany; and being so seized, he, together

with the complainant, executed a mortgage thereon to the commissioners of the city stock to secure the payment of \$1,000 and interest. On the 26th of February, 1823, Spencer and Corning obtained a judgment against Russell in the Supreme Court, and issued an execution thereon; by virtue of which, the premises were sold to Corning on the 20th of December, 1823, for \$600, and he received a certificate of such purchase from the sheriff. Russell died in possession of the premises on the 2d of December thereafter. At the expiration of the fifteen months allowed for redemption, Corning received a conveyance from the sheriff; and on the 28th of April, 1825, he also obtained an assignment of the bond and mortgage given to the commissioners of the city stock. The complainant continued in possession until the 1st of May, 1825, when Corning took possession. On the 4th of March, 1826, he conveyed the premises by quit claim deed to the defendant, and at the same time assigned to him the bond and mortgage. On the 29th of June, 1827, the complainant filed her bill in this court, claiming dower in the whole premises, and the arrears thereof from the time she left the possession. The defendant having answered the bill, the cause was brought to hearing on pleadings and proofs.

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J. King for complainant:—The principal question is, whether the complainant is entitled to dower in the whole estate, or only in the equity of redemption. The assignment of the bond and mortgage by the commissioners of the city stock to Corning, he at the time having the legal title to the premises, operated as an extinguishment of the mortgage. It became merged in the legal estate. Whenever the legal and equitable estate unite in the same person, the latter becomes merged in the former. (*James v. Morey*, 2 Cowen's Rep. 300; *Tice v. Annin*, 2 John. Ch. Rep. 125; **Gardner v. Astor*, 3 John. Ch. Rep. 58; *Mills v. Comstock*, 5 John. Ch. Rep. 214; *Starr v. Ellis*, 6 John. Ch. Rep. 393; *Swain v. Perine*, 5 John. Ch. Rep. 482.) The complainant

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is entitled to the costs of this suit. The defendant in his answer denied the coverture alleged in the bill, and the complainant was compelled to take proof to establish it.

J. I. Ostrander for the defendant:—Whether by taking an assignment of an outstanding title there shall be a merger of such title in a prior estate, depends upon the intention of the person who takes the assignment. (*Swain v. Perine*, 5 John. Ch. Rep. 482; *Tabele v. Tabele and others*, 1 John. Ch. Rep. 45; *Titus v. Neilson*, 5 John. Ch. Rep. 452; *Starr v. Ellis*, 6 John. Ch. Rep. 398; *James v. Johnson & Morey*, 6 John. Ch. Rep. 417; *James v. Morey*, 2 Cowen's Rep. 300; *Jackson, ex dem Bruyn v. Dewitt*, 6 Cowen's Rep. 316; *Coates v. Cheever*, 1 Cowen's Rep. 460.) In this case, Corning purchased the outstanding mortgage for the express purpose of protecting himself against the complainant's right of dower. The complainant is not entitled to arrears of dower, her husband not having died seized, the equity of redemption having been sold upon an execution previous to his death. (1 Hop. R. 88.) The complainant is not entitled to costs, not having demanded her dower previous to the commencement of the suit. (*Hale v. James*, 6 John. Ch. Rep. 258; *Swain v. Perine*, 5 John. Ch. Rep. 482; Mit. Pl. 111.

THE CHANCELLOR:—There is no doubt of the complainant's right to be endowed of the premises which formerly belonged to her husband. She claims the one-third of the premises as her dower, and the arrears which have heretofore accrued, together with the costs of this suit; but the defendant insists she is only entitled to dower in the equity of redemption, and that she has no claim, either for the arrears or for costs.

In the case of *Coates v. Cheever* (1 Cowen's R. 460,) the Supreme Court decided that the widow was entitled to dower, as well in that half of the premises against which Cheever had purchased an outstanding mortgage, as in the

other half *on which there was no incumbrance. Although the court in that case speak of the incumbrance being merged in the estate which existed in Cheever at the time of the assignment, they could not have intended to overturn the doctrine, which had before been established in this court, that the widow must contribute her share towards paying off the incumbrance. That was an appeal from the decision of a surrogate, in a proceeding to admeasure dower under the statute. The question of equitable contribution could not arise under those proceedings in a court of law. The only question before the court was, whether she was entitled to dower in that half of the property. And Cheever would still have been at liberty, notwithstanding that decision, to have applied to this court to compel contribution. There was no merger of the mortgage in this case by the assignment to Corning, or by the assignment from Corning to the defendant. In the case of *James v. Morey*, (2 Cowen's Rep. 246,) the Court of Errors decided that the question of merger depended on the intention of the person who took the assignment of an outstanding title or estate, provided he had any interest in keeping up the incumbrance, and preventing a merger thereof in his prior estate. At the time of the assignment of the mortgage, in this case, the husband was dead and the wife's right of dower in the premises had become complete. The mortgage was purchased in and assigned, instead of being paid off, under the advice of counsel; and for the avowed object of protecting the assignee against the claim of dower, to the extent of that incumbrance. There can, therefore, be no pretence that the mortgage interest was merged by the assignment to Corning, or by the sale and assignment to the defendant, when it was still kept on foot for the same purpose. The widow is only entitled to dower in the equity of redemption, and must contribute her share towards the payment of the mortgage.

In this case the husband died seized of the premises, and

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v.
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she is entitled to the arrears of her dower. Although the land had been sold by the sheriff, the time within which the husband was entitled to redeem had not expired at his death. The sale by the sheriff changed the general lien of *the judgment to a specific lien in favor of the purchaser, to the amount of the purchase-money and interest; and until the time of redemption expired, the estate of the purchaser was in the nature of a mortgage, and the seizin of the husband was not divested. But the widow is not entitled to recover against the defendant any arrears which accrued previous to his purchase of the premises. The arrears from that time must be ascertained by computing the amount due on the bond and mortgage at the time of the defendant's purchase, and then deducting one-third of the interest on that amount from one-third of the rents and profits of the property, over and above the necessary repairs, taxes, &c. And this will also form an equitable rule by which the parties may settle an annuity to be paid to the complainant, hereafter, in lieu of her dower. If the parties cannot agree upon an annuity, the complainant will be entitled to be endowed of one entire third of the premises, on her keeping down one-third of the interest on the amount due as aforesaid, or by paying a sum in gross in proportion to the value of her life estate in the premises.

The question of costs in this as in other cases in Chancery, depends upon the exercise of the sound discretion of the court. If the complainant had made application to the defendant to assign her dower in the premises, or to pay her an equivalent therefor, and he had refused such reasonable request, I should have considered her entitled to the costs of this suit. But it appears by the answer that she never applied to him for her dower; and the first notice he had that she intended to make such a claim was by her bill, in which she alleged that the mortgage had been paid off, and insisted upon her right to be endowed of the whole premises, and claimed the arrears as well before as after his pur-

chase. The defendant has been compelled to resist this unfounded claim, and I think it a proper case for each party to bear their own costs.

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v.
Fuller.

*HAMMOND AND OTHERS v. FULLER AND OTHERS.

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Where a party by erecting a dam raises a stream of water above its natural level, so as materially to injure mills above, on the same stream, a court of chancery will decree that the dam be lowered, and that the party erecting the same pay all the damages occasioned by raising the water above its natural level.

THIS was a motion for an order requiring the defendants Sept. 11th. to remove a dam on the Paradox Creek, in the county of Essex, which the complainants alleged had been erected in such a manner as to violate the injunction issued in this cause. The facts sufficiently appear in the opinion of the Chancellor.

J. King and G. V. Denniston, for the complainants.

R. Weston, for the defendants, cited *Platt v. Root*, (15 John. R. 219;) *Palmer v. Mulligan*, (3 Caines' R. 320;) *Gardner v. Village of Newburgh*, (2 John. Ch. R. 164;) *Corporation of New York v. Mapes*, (6 John. Ch. R. 46;) *Reid v. Gifford*, (4 John. Ch. R. 19;) Dickens' Rep. 395.

THE CHANCELLOR :—The contest between the parties on this motion is, whether the dam of the defendants raises the water of the Paradox Creek at and above the line between Pliny Mooers' patent and lot No. 306 in the Paradox tract, above the natural level of the stream, as it existed previous to the erection of the mills of either of the parties; and in such manner as materially to injure the mills or mill priv-

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illeges of the complainants. If it does so, the defendants must lower their dam, and pay to the complainants the damages which they have sustained by the violation of the injunction. It is impossible for the court, from the mass of contradictory affidavits presented, to determine this question with any reasonable prospect of doing justice between the parties. An issue must therefore be awarded to determine the question; and then both parties will have an opportunity to cross-examine the witnesses before the jury. But as the merits of the whole *suit depend upon the same question, and the parties are willing that one issue only should be awarded if an issue is necessary on this motion, there must be a decree entered directing an issue to be made up and tried at the circuit in the county of Essex, to determine this question; and the issue must be formed in such a manner that the jury which tries such issue, if the same is found for the complainants, may also assess the damages which they have sustained in consequence of such raising of the water at and above the line of lot No. 306, and that the damages be ascertained by the verdict up to the time of the trial of such issue. And all other proceedings on the motion which has been made to remove the dam of the defendants, and all further questions and directions in relation to the suit generally, must be reserved until after the trial of the said issue.

CHASE v. CHASE.

Three promissory notes were given by W. to the wife of C. before her marriage. After the marriage, C. left the notes with B. for collection, and in Sept., 1827, C. assigned the notes to G. The latter afterwards ascertained that a few days before the assignment, one H. as the agent of the wife, obtained the notes from B. and delivered them to W. and received new notes in his own name. G. then commenced an action of trover in the name of C. against H. for the notes so delivered to W. The wife filed

a bill against C., her husband, claiming the notes, and obtaining an injunction to stay the proceedings at law against H. It was held, that G. had no right to bring an action of trover in the name of C., but his remedy, if any, was either by an action at law in the name of C. and wife against W. to recover the amount of the original notes, or by an action of trover in his own name against H. for a conversion subsequent to the assignment, or by a bill in equity against all the parties, to obtain the possession or proceeds of the new notes.

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v.
Chase.

The assignee of a chose in action may sue at law in the name of the assignor, and to a bill for an injunction to stay the suit at law, the assignee must be made a party, or the court will permit him to proceed in the name of the assignor.

If promissory notes are assigned before a conversion, the assignee alone has a right to maintain an action of trover.

Where the notes were converted before the assignment, the simple assignment of the notes will not authorize the assignee to prosecute in the name of the assignor for the previous tort.

*THIS was a motion founded upon the petition of William C. Gardner for a dissolution or modification of the injunction issued in this cause. The petition stated, that in January, 1826, three promissory notes were given by Job Whitney to Sophia Bacon, who afterwards married the defendant in this cause; that the defendant left the notes with B. Bradford for collection; that in September, 1827, Chase sold and assigned the notes to the petitioner; that the petitioner afterwards ascertained that a few days before the assignment, Healy, acting as the agent of Mrs. Chase, applied to Bradford and obtained the notes, and delivered them up to Whitney, and received new notes in his own name; that the petitioner thereupon commenced an action of trover in the name of Alvah Chase, against Healy, for the notes so given up; that the wife of Chase has filed a bill against her husband in this court, claiming the notes, and has obtained an injunction to stay the proceedings at law against Healy, but has not made the petitioner a party thereto.

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THE CHANCELLOR:—If the petitioner had shown any authority to prosecute the action of trover against Healy, in the name of Chase, the injunction would not be permit-

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ted to affect his rights without making him a party to the bill. (*Nugent v. Smith*, Moseley's R. 854.) The assignee of a chose in action may sue at law in the name of the assignor; [1] and in such cases, the assignee must be made a party to a bill for an injunction to stay the suit at law, or the court will permit him to proceed in the name of the assignor. [2] In this case, if the notes were assigned before

[1] Courts of law, in this state, under sec. 111, New York Code, have adopted the Chancery practice, as to parties, with a few slight modifications, per *Mason, J.*, in *Wallace v. Eaton*, 5 How. Pr. R. 99, 100, and per *Parker, J.*, in *Hollenbeck v. Van Valkenburgh*, id. 281, 284. Every action at law must now be prosecuted in the name of the real parties in interest. But an executor or administrator, or a trustee of an express trust, or person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. (Seca. 111, 113.) Previously an action at law, to recover chose in action, should be in the name of the assignor, or if dead, his personal representative, if any; but if there was no executor or administrator, the assignee might sue in his own name. 2 R. S. (2d ed.) 274, sec. 5; *Seeley v. Seeley*, 2 Hill, 496; See *Corbin v. Emerson*, 10 Leigh, 663; *Bell v. Shrock*, 2 B.Mon. 29.

[2] In equity, parties to a suit may be classed under three heads:

- 1st. Those who may be parties.
- 2d. Those who should be parties.
- 3d. Those who must be parties.

Those who may be parties.—Are those who have no real or legal interest, and who, without being improper, are not necessary parties; as for example, the assignor of an absolute and voluntary assignment of a judgment, or an equity of redemption. *Beeren v. Crane*, 1 Green, Ch. R. 348; *Vreeland v. Loubot*, ib. 104, 348; *Chester v. King*, id. 405. Or, where a person implicated in a fraud, is made a party, for the purpose of charging him with costs. *McCloster v. Brady*, 1 Barb. Ch. R. 343; S. C., 1 Comst. 214. Or a residuary legatee to a bill by a creditor seeking to charge the general assets of the testator. *Burrwell v. Corwood*, 2 How. U. S. 575. But in general no one should be a party, against whom no judgment could be rendered. *Reemsdyke v. Kane*, 1 Call. 383; *Vanderpool v. Devenport's Ex'rs*, 2 Green, C. R. Where, however, the assignment is involuntary, as if made by operation of law, the assignor must be made a party. *Sedgwick v. Cleveland*, 7 Paige, 289; *Mills v. Hoag*, id. 21.

Those who should be parties.—The exact difference between those who may be, and those who should be parties, is slight, and the line of demarcation

the conversion, the assignee would have a right to maintain the action of trover in his own name, but could not recover in the name of the assignor, who had no interest in the notes at the time of the conversion, and therefore could not be injured thereby. If the notes had been delivered up and cancelled before the assignment, so that Chase had no remedy thereon, but had a good cause of action against Healy for the conversion, the simple assignment of the notes would not authorize the assignee to prosecute in the name of Chase for the previous tort.

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If the petitioner has any remedy, it must be either by an action at law, in the name of Chase and wife against Whitney *to recover the amount of the original notes, or by an action of trover, in his own name against Healy, for a conversion subsequent to the assignment, or by a bill in equity against all the parties, to obtain the possession or proceeds of the new notes, to which, perhaps, he may in equity be entitled, subject to the wife's equity.

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Under the circumstances disclosed in the petition, the suit at law must be considered as an action brought by

often difficult to trace. It is said that it may be done by limiting the class of those who should be parties, to those who have an interest in the event of the suit. *Wiser v. Blackley*, 1 John. Ch. 438; *King v. Berny's Ex'rs*, 2 Green. Ch. 52; *Caldwell v. Tuggart*, 4 Pet. 190; *Bank Alexandria v. Seaton*, 1 id. 306; *Marshall v. Beverly*, 5 Wheat. 313; *Wendell v. Van Rensselaer*, 1 John. Ch. 349; *Hallett v. Hallett*, 2 Paige, 15; see also Am. Ch. Dig. by Waterman, tit. Parties.

Those who must be parties.—Includes, as a general thing, those who should be parties, and extends to all persons materially interested, in the matter of the bill, as plaintiffs or defendants. Such persons should be made parties, however numerous they be. *West v. Randell*, 2 Mason, 181; *Crocker v. Higgins*, 7 Conn. 342; *Wendell v. Van Rensselaer*, 1 John. Ch. 349; *New London Bank v. Lee*, 11 Conn. 112. The rule as to those who should be parties, is extremely pliable, and may be moulded to suit the ends of justice. *Hallett v. Hallett*, 2 Paige, 15, and cases there cited. But the court will not exercise such latitude of discretion, when the rights of persons not before it, are so inseparably connected with the claims of the parties litigant, that no decree can be made without affecting the rights of the former. *Id.* See sec. 117, N. Y. Code.

1828. Chase in his own right, or brought by the petitioner in his name, without right or authority.
- Stafford v. Howlett. The motion to dissolve the injunction is refused, with costs to be paid by the petitioner.

STAFFORD AND OTHERS v. HOWLETT AND WEST.

An original bill cannot be amended by incorporating therein any thing which arose subsequent to the commencement of the suit. This should be stated in a supplemental bill.

All matters which arose previous to the filing of the original bill, although discovered afterwards, should be introduced into the same by way of amendment, if the cause is in a stage in which an amendment is allowable.[1]

If the cause has progressed so far that an amendment cannot be made, or if material facts have occurred subsequent to the commencement of the suit, the court will give the complainant leave to file a supplemental bill. And where such leave is given, the court will permit other matters to be introduced into the supplemental bill, which might have been incorporated in the original bill by way of amendment.

If it appears upon the face of the supplemental bill that all the matters alleged therein arose previous to the commencement of the suit, and might have been inserted in the original bill by way of amendment, the defendant may demur. But if this irregularity does not appear upon the face of the supplemental bill, the facts may be brought before the court by plea.

Sept. 13th. THE complainants, as execution creditors of Simeon West, filed their original bill against him and two others,

[1] See New York Code, sec. 177; *Verplank v. Mercantile Ins. Co.*, 1 Edw. 46; *Bennington Iron Co. v. Campbell*, 2 Paige, 169; *Hunt v. Holland*, 3 id. 78; see further Am. Ch. Dig. by Waterman, tit. *Amendment*.

Supplemental answers in equity have not only been allowed, when facts material to the case were discovered subsequent to filing the answer, *Strange v. Collins*, 2 Ves. & B. 163; *Taylor v. Obee*, 3 Price; *Redley v. Ofec. Wightw.* 32; but also in cases where a defendant was ignorant of those facts. *Jackson v. Parish*, 1 Sim. 505; *Tidswell v. Boyer*, 7 id. 64. And where he knew of them, but was induced to leave them out, under mistaken advice of counsel. *Nail v. Punter*, 4 id. 440. Or through the misrepresentation of the complainant. *Curling v. Marquis of Townshend*, 19 Ves. 628.

for the purpose of obtaining satisfaction of their debt out of his property which had been placed beyond the reach of their execution. After the other two defendants had answered, the complainants filed their supplemental bill against West, one of the original defendants, and Howlett, who was not a party *to the former proceedings, alleging that West had assigned portions of his property to Howlett, for the purpose of defrauding the complainants, and defeating their original bill.

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v.
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To the supplemental bill the defendants put in a plea, alleging that if the complainant ever had any cause of suit against them, for or concerning any of the matters in the supplemental bill mentioned, the same arose before the filing of the original bill.

J. W. Cushman, for the complainants, cited *Allen v. Randolph*, (4 John Ch. Rep. 693;) *Beames' Pleas*, 29.

S. A. Foot, for the defendants, cited *Cooper's Pl.* 203, 4, 214; *Mitf. Pl.* 234, 5, 6 and 164.

THE CHANCELLOR:—It is a well settled rule that nothing can be inserted in an original bill by way of amendment which has arisen subsequent to the commencement of the suit, but the same must be stated in a supplemental bill. On the other hand, matters which arose previous to the filing of the original bill, although discovered by the complainant afterwards, should be introduced into the same by way of amendment, provided the cause is in that stage in which an amendment is allowable. (*Mitford's Pleadings*, 60.) If the cause has progressed so far that an amendment cannot be made, or if material facts have occurred after the commencement of the suit, the court, on a proper application, will give the complainant leave to file a supplemental bill. (*Goodwin v. Goodwin*, 3 Atk. 370.) And wherever the party is permitted to file such bill for the purpose of introducing matters which have arisen subsequent to the

1828. filing of the original bill, the court will also give to the
 Whittick complainant permission to introduce other matters into the
 v. supplemental bill, which might have been introduced by
 Kane. way of amendment to the first bill.

If it appears upon the face of the supplemental bill that the whole of the matters charged therein arose previous to the commencement of the suit, and that the situation of the cause is such that they may be inserted in the original bill by amendment, the defendant may demur. (Mitford's Plead. 164. *Baldwin v. Mackown*, 3 Atk. 817.)

[*202] *But if it does not distinctly appear by the supplemental bill, that the new matters charged therein arose before the filing of the original bill, the defendant can only take advantage of the irregularity by a plea alleging the fact. (Mitford, 230.)

The bill and plea in this cause taken together show, that the new matters are improperly brought before the court by this supplemental bill, and that they were the proper subjects of an amendment of the bill in the original suit; the plea must therefore be allowed.

WHITTICK v. KANE AND OTHERS.

Parol evidence is admissible to show that a deed, absolute in its terms, was intended by the parties as a mortgage.[1]

Bona fide purchasers without notice, who have actually paid the purchase-money, cannot be disturbed in their title to the premises purchased, where the deed intended as a mortgage is absolute on its face.

In such cases, the remedy of the mortgagor is personal against the mortgagee and his legal representatives for the moneys received on the sale of the mortgaged premises.

In taking and stating an account of the amount due on such mortgage, the mortgagee will be charged with the rents and profits of the mortgaged

[1] See *Ante*, 77.

premises from the time he took possession, and also with the amount of the purchase-money received by him on the sale of the premises, together with interest thereon to the time of stating the account.

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Whittick

v.

Kane.

THE complainant filed his bill in this cause in October, 1821, setting forth that, in January, 1772, his paternal grandfather owned lot No. 19, in Snyder's patent, in the town of Hoosick; that he was about 60 years old, ignorant and incapable of reading or writing, or of understanding the contents or import of legal conveyances. That on the 11th of November, 1768, he borrowed of Cornelius Van Schelluyne, father of Dirck Van Schelluyne one of the original defendants in this cause and of Deborah the wife of Elias Kane, £50, for which he gave his bond payable with interest, together with a warrant of attorney to confess judgment thereon, but no judgment was entered. That on the 18th of *January, 1772, Whittick executed to Schelluyne an absolute deed of lot No. 19, and of two other lots which afterwards fell within the Vermont line; which deed was only intended as a security, by way of mortgage, to secure the money loaned, with interest thereon, but no written defeasance was ever executed. That Whittick continued in possession of the whole premises until two lots were taken by the state of Vermont, and then continued in the actual uninterrupted possession of lot No. 19 until his death, in 1791, and always considered and spoke of the conveyance to Schelluyne as a mortgage; and the latter never claimed the possession or fee of the premises, or exercised any acts of ownership over the same by leasing, or otherwise, but always treated the premises as the property of Whittick, subject however to the payment of his debt. That at the death of John Whittick, he left two children; Abraham, the father of the complainant, and Henry, an idiot. That Abraham Whittick continued in possession of No. 19 until July, 1792, when he died in possession, leaving his wife and the complainant, and his sister, then infants under the age of three years, him surviving, who together with the idiot continued in possession of the premises. That in 1796, the complain-

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ant's mother married Henry Lampman, who came on to the lot and continued in possession thereof, by virtue of the estate of his wife, and continued to reside on the premises until the death of the complainant's mother in 1798; when he left the premises, and Peter I. Lampman entered into possession thereof. That Peter I. Lampman attorned to Schelluyne and continued to reside on the premises with Henry Whittick the idiot, until April, 1816, and during that time made large payments to Schelluyne out of the produce of the lot towards the debt for which it was mortgaged. That Cornelius Schelluyne, down to the time of his death, in 1813, never pretended to have any thing more than a mortgage interest in the premises; and frequently admitted the right of the complainant and his sister to redeem the same when they were of age, and promised to convey to them on the complainant's giving security to support his uncle, the idiot. That in 1809, the complainant's sister married Solomon Foster, *and moved to some part of the state of Ohio; and Henry Whittick, the idiot, died in 1820, leaving the complainant and his sister his heirs at law. That Cornelius Van Schelluyne devised and bequeathed all his estate to his son Dirck and to his daughter Deborah, wife of Elias Kane, and made his son and Kane executors. That in 1816, the defendant Kane went on to the premises, claiming the same in behalf of his wife and Schelluyne, and directed Lampman to remove therefrom, together with Henry Whittick, the idiot; and that on the 22d of March, 1816, Dirck Schelluyne and wife, and Kane and wife, conveyed the premises in fee to the defendants Rogers and Sherwood, for \$2,500.

The defendants Rogers and Sherwood, by their answer, admitted the purchase made by them, but insisted that they were *bona fide* purchasers without notice of the equitable right claimed by the complainant. Dirck Schelluyne and Kane and wife denied all knowledge that the conveyance of the premises to Cornelius Schelluyne, in 1772, was intended as a mortgage, and insisted upon it as an absolute

conveyance. They admitted the sale of the premises to Rogers and Sherwood, but denied all knowledge of the principal facts stated in the bill, and put the complainant to the proof thereof; and they also alleged that they had found among the papers of Cornelius Van Schelluyne a bond, purporting to be executed by John Whittick and Abraham Whittick, dated January 24th, 1787, conditioned to pay him £225 12s. on the 1st of February then next, with interest, and also a warrant of attorney to confess judgment thereon; that no judgment had been entered, and no payment was indorsed thereon; and they insisted upon the benefit of the statute of limitations, and the statute of frauds.

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v.
Kane.

The defendant Dirck Van Schelluyne died after proofs had been taken in the cause, and the suit was revived against his heirs and legal representatives.

C. V. Denniston, for the complainant.

C. V. S. Kane, for the defendants.

*THE CHANCELLOR:—By the testimony in this cause, the complainant has established the principal allegations contained in his bill. It appears that Crean Brush, by lease and release bearing date on the 24th and 25th of September, 1762, for the consideration of 50*l.*, conveyed lot No. 19 in Snyder's patent, in the town of Hoosick, to John Whittick or Whittick, the paternal grand-father of the complainant, together with two other lots which were then supposed to be within that patent, but which afterwards fell within the line of the state of Vermont. Whittick went into possession of the land, and continued to reside thereon till his death; and his sons Abraham Whittick, father of the complainant, and Henry Whittick, an idiot, resided with him on lot No. 19, which is the only subject of controversy in this cause. In 1791, John Whittick died intestate, and leaving his two sons his only heirs at law. In the succeed-

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1828. ing year, Abraham was killed by being thrown from a
 Whittick horse, and left the complainant and his sister Caty, both at
 v. that time very young, his only children and heirs. The
 Kane. widow of Abraham continued on the farm with her infant
 children, and their uncle the idiot, and a few years afterwards married Henry Lampman, who moved on to the farm with her. She died shortly after, and the complainant was then put out to learn a trade, and his sister went to live with one of her maternal relatives. Henry Lampman soon after left the farm, and Peter I. Lampman succeeded him; but in what manner he went into possession does not distinctly appear. Henry Whittick, the idiot, continued to reside with him on the farm, and was supported by him until he left the place in 1816. Peter I. Lampman either went into possession under Schelluyne, or attorned to him afterwards; as he recognized him as his landlord, and paid him rent for the use of the farm over and above the expense of supporting the idiot, who was wholly incapable of doing any thing for himself. In 1809, Caty, the sister of the complainant, then under age, married Solomon Foster, and a few years afterwards moved to the state of Ohio, where she and her husband and one of her children have since died, but *leaving one child who is supposed to be still living. When Lampman was turned out of possession of the farm, by the defendants, in 1816, Henry Whittick, the idiot, was also removed therefrom, and died in the poor-house in 1820, without issue.

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John Whittick, the grand-father of the complainant, executed a conveyance of lot No. 19, and the two other lots, to Cornelius Van Schelluyne, by lease and release, bearing date the 17th and 18th of January, 1772, which the complainant insists was only intended as a mortgage or security for the repayment of the 50*l.* loaned to the grand-father by Schelluyne in November, 1763, and that both parties always considered and treated it as a mortgage only.

The conveyance is absolute in its terms, and was not accompanied by any written defeasance; and the defendant's

counsel contended that parol evidence cannot be received to establish the claim set up in the complainant's bill. Since the decision of the case of *Clark v. Henry* in the Court of Errors, (2 Cowen's Rep. 824,) I consider the law as settled in this state, that parol evidence is admissible to show that a deed, absolute in terms, was intended by the parties thereto only as a mortgage, or security for the payment of money. It will, therefore, be necessary to examine the evidence produced by the complainant in this case to support this allegation in his bill.

All the witnesses agree that Whittick was a very illiterate man, unable to read or write; and the deeds produced appear to have been executed, both by himself and wife, by affixing their marks.

Nathaniel Barnet testifies that in 1781, Schelluyne told him he had an absolute deed of the farm from John Whittick, which he had taken as security for money he had lent Whittick have to enable him to improve the land; the witness thinks the amount stated to have been lent was 100*l*. The witness observed to Schelluyne, "we Yankees do business in a different way;" to which he replied, it was customary among the Dutch to deal in that way, as they had more confidence in each other than Yankees had. Schelluyne further *remarked that he did not consider himself to be the owner of the land, and considered the deed only as a security for the money lent. This evidence is strongly corroborated by the fact that John Whittick continued in the uninterrupted enjoyment of the farm claiming and improving it as his own until his death, nearly twenty years after the giving the deed; and that his heirs continued in the undisturbed possession for six or seven years afterwards, and until all who were in a situation to cultivate or carry on the farm were dead. Schelluyne then put a tenant in possession of the land; but the idiot son of John Whittick still continued to live there, and was supported out of the rents and profits of the farm during the life of Schelluyne.

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 v.
 Kane.

William Lake also testifies that in 1810 or 1811, he had a conversation with Schelluyne in which he acknowledged the right of the heirs of Whittick to redeem the farm, and admitted that he did not purchase the same, but only took the deed as security for the repayment of money loaned, which the witness thinks was said to be £60.

Henry A. Lake, also testifies to the same conversation, substantially, in 1811; and to similar conversations with Schelluyne, in 1809 and 1812, when he called upon him in relation to this business on behalf of the complainant and his sister.

Among the exhibits produced by the complainant is a cancelled bond and warrant of attorney, given by Whittick to Schelluyne, dated the 11th of November, 1763, conditioned for the payment of £50 and interest. And the defendants also produce a bond dated the 24th of January, 1787, given by John Whittick and his son Abraham, to Schelluyne, conditioned for the payment of £225 12s. with interest, witnessed by Henry Truax, and the body of which is apparently in the same handwriting. Truax, who was examined as a witness, does not appear to have been shown this bond, or interrogated respecting the same. But he does testify that he was once at the house of Whittick, in Hoosick, with Schelluyne, between 30 and 40 years previous to his examination, (probably at the time that bond was given;) that Schelluyne went to see about money owing to him by Whittick; and the witness was never there before or since.

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*From the testimony which I have mentioned, independent of any other which was given in the case, I am satisfied the deed from Whittick was only intended by the parties as a security for the payment of money. The precise sum which was due does not distinctly appear; but it is probable the bond dated in 1787, and found among the papers of Schelluyne, was the sum actually due at that time.

This bond cannot, as is supposed by the defendants, have

been given for the loss of the two lots of land, embraced in the deed, which afterwards fell into the state of Vermont. The act authorizing the cession of the state of Vermont was passed three years after the date of that bond; and the cession was not made by the commissioners till the 7th of October, 1790. By the agreement of the commissioners, the state of Vermont paid \$30,000, for the purpose of indemnifying the owners of lands deriving titles from this state which fell within the bounds of Vermont, as settled by the commissioners. If Schelluyne received any of those moneys, under the act of the 6th of April, 1795, for the two lots included in the deed from Whittick, the same must be deducted from the amount due on account of the loan.

The acknowledgment of Schelluyne, within ten years previous to the commencement of this suit, is a sufficient answer to the objection arising from the lapse of time, independent of the fact of the infancy of the complainant and his sister, and the idiocy of their uncle, who owned one-half of the premises.

The conveyance to Schelluyne being absolute on its face, and the defendants Rogers and Sherwood having purchased the premises and actually paid the purchase-money, without notice of the equitable rights of the complainant, their title to the premises cannot be disturbed. The remedy of the complainant is against the defendants Kane and wife and the legal representatives of Dirck Van Schelluyne, for the moneys received on the sale to Rogers and Sherwood. There must be a reference to a master to take and state an account of the amount due on the mortgage for principal and interest, taking the sum mentioned in the condition of the bond of the *24th of January, 1787, as the amount due at that time, and charging the defendants for all sums received by Schelluyne afterwards; and also charging them for any sums received by Schelluyne from this state, or otherwise, on account of the two lots which fell into the state of Vermont; also charging them with the rents and

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1828. profits of lot number nineteen, from the time that Schel-
lunyne took possession thereof by his tenant, until the sale to
Knickerbacker Rogers and Sherwood, excepting so much thereof as was
v. applied to the support of Henry Whittick the idiot. The
Harris. defendants must also be charged with the amount of the
purchase-money received from Rogers and Sherwood, and
interest thereon from the time of the sale to them. And
the usual authority must be given to the master to examine
the parties on oath, and to compel the production of books
and papers; and all other questions and directions must
be reserved.

KNICKERBACKER *v.* HARRIS.[1]

Where a parol agreement was made for the purchase of a lot of land for the sum of \$21 50 per acre, to be paid in seven equal annual payments, and by the agreement, the grantor was to have the lot surveyed and to give a conveyance with warranty, on the payment of \$300 by the grantee, and upon his executing to the grantor a bond and mortgage for the residue of the purchase-money: and the grantee went into possession under the agreement, and continued in possession 8 or 9 years, making payments from time to time towards the land, for which the grantor gave receipts, specifying therein that the moneys received were in payment for the land, and that he, the grantor, was to give the grantee a deed therefor; the grantee made a payment of \$333 soon after he went into possession, at the expiration of 8 years from the time the agreement was made, the grantor tendered a deed to the grantee, and demanded payment or security for the balance of the purchase-money, the defendant refused to accept the deed, alleging that it contained too much land, and that the grantor had included too much interest in the balance he claimed to be due, it was held, that neither party could take advantage of the agreement's not being in writing, that it was too late for the defendant to object that the grantor had not caused a survey to be made of the lot, and delivered a deed therefor immediately after the first payment, that the defendant could only have put an end to the contract by tendering the balance due and demanding

[1] Reversed, see S. C., 5 Wen. 638.

a performance of the contract on the part of the grantor; that a tender and demand made, *after a bill had been filed by the grantor for a specific performance, was a nullity.

1828.

Knickerbocker
v.
Harris.

Where a defendant in his answer only denies a fact charged in the bill, according to the best of his knowledge and belief, a single witness on the part of the complainant is sufficient to establish the fact.

Where, in a bill filed for a specific performance of a contract for the sale of land, the complainant insisted upon the defendant's taking two acres more than he was bound to take, and the defendant declined paying interest, which the complainant was entitled to, neither party was allowed costs.

In September, 1815, the defendant agreed with the com- October 7th.
plainant to purchase of him a lot of land in Greenfield, in the county of Saratoga, supposed to contain about 100 acres, being the north part of lot No. 1, in great lot No. 2, in the 22d general allotment of the Kayaderosseras patent, north of and adjoining lands before that time sold by the complainant to William Seymour. The defendant was to pay \$21 50 per acre for the land, the quantity to be ascertained on actual survey, and to be paid in seven equal annual payments. The complainant was to have the lot surveyed, and to give a conveyance to the defendant, with warranty, on his paying \$300, or more, of the purchase-money, and giving to the complainant a bond and mortgage to secure the payment of the residue. The complainant alleged that the defendant was to pay interest from the time of the purchase. The defendant said he had no knowledge, remembrance or belief that by the terms of the original bargain any interest was to be paid. But one of the defendant's witnesses testified that he understood from him, he was to pay interest after the first payment became due on the 20th of December, 1815. The contract for the purchase of the farm was not reduced to writing by the parties; but the defendant went into possession of the lot under the agreement, and continued in possession until February, 1824. On the 23d of December, 1815, the defendant made a payment towards the land, and took a receipt from the complainant in the words following: "Rec'd this 23d December, 1815, of John Harris, three hundred thirty-three

1828.
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 v.
Harris.
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dollars, in part payment of a piece of land which I am to deed to him, lying in the town of Greenfield, adjoining lands lately sold to William Seymour by me, which conveyance is to be made as soon as the land can be run out. John *Knickerbacker, jun." The defendant continued to make payments towards the lands from time to time, until the 28d of August, 1821, and took receipts therefor, specifying that the moneys received were in payment of the land, and that complainant was to give him a deed therefor. Several surveys were attempted, but the parties could not agree as to the location and boundaries of the lot. In the fall of 1823, the complainant tendered to the defendant a deed, and demanded payment or security for the balance of the purchase-money. The defendant refused to accept the deed, alleging it contained too much land, and that the complainant had included too much interest in the balance claimed to be due. In January, 1824, the bill in this cause was filed to compel a specific performance, and in February thereafter the defendant made a formal demand for a deed from the complainant, but made no tender or offer to pay the balance then due. The complainant declined giving him any other deed than the one offered before; whereupon the defendant gave him a written notice that he considered the contract at an end, and demanded repayment of the purchase-money. The defendant afterwards commenced a suit at law to recover back the money which had been paid; the proceedings in which suit have been stayed by an order of this court.

J. L. Viele, for the complainant.

L. H. Palmer, for the defendant, cited *Bogart v. Perry*, (1 John. Ch. R. 52;) *Parkhurst v. Van Cortlandt*, (1 John. Ch. R. 274;) *Hatch v. Cobb*, (4 John. Ch. R. 559;) *Benedict v. Lynch*, (1 John. Ch. R. 370;) *Lord Walpole v. Lord Orford*, (3 Ves. 403, 420;) *Buxton v. Lister*, (3 Atk. 386;) *Sugden's Law of Vendors*, 272.

THE CHANCELLOR:—The agreement between the parties, although not in writing, has been so far carried into effect that neither party is now at liberty to make that objection. The defendant went into possession of the premises under the agreement, and occupied the same between eight and nine years; and the complainant, during the same period, has received the principal part of the purchase-money. It is *also too late for the defendant to object that the complainant did not cause the premises to be surveyed and give him a deed therefor immediately after the first payment. He has waived that objection by continuing to make payments towards the land for several years afterwards. This must be considered as an election, on his part, not to rescind the contract in consequence of that neglect on the part of the complainant.

1828.
Kniebsacker
v.
Hamis.

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In 1823, the purchase-money was all due, and the defendant could only put an end to the contract, at that time, by making a formal tender or offer to pay the balance due, and by demanding a performance of the contract on the part of the complainant. At the time the formal demand was made in February, 1824, this suit was pending to compel a specific performance of the contract; and the rights of the parties must be determined without reference to that transaction. If any effect is to be given to that proceeding, it is evidence that up to that time the defendant considered the contract in force, as he then demanded to have it fulfilled. It therefore becomes necessary to ascertain what that contract was, in order to do justice between the parties.

If the defendant, in his answer, had explicitly denied that he was to pay any interest, or alleged that the agreement was that the payments were to be made without interest, it would have been incumbent on the complainant to disprove that allegation in the answer by more satisfactory testimony. But a denial according to the best of his knowledge and belief, or in other words saying he has no recollection it was so, merely throws the proof upon the other party, and a single witness is sufficient to establish the fact.

1828.
 Knickerbacker
 v.
 Harris.

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In the first place, it is highly improbable that the agreement was that he should have seven years to pay for the farm without interest; as it is contrary to the usual mode of making such sales, where the purchaser goes immediately into possession. In addition to this, we have the testimony of Thomas Scott, the defendant's witness, that he told him he was to pay interest on the purchase-money from the 20th of December, 1815, the time he was to make the first *payment. The complainant therefore is entitled to interest on the purchase-money from that time.

As to the controversy about the two acres which were included in the lot conveyed to Seymour, more than he was entitled to, the defendant is not bound to take that land, although the complainant has now a perfect title to the same. At the time of his purchase, that land had been conveyed to Seymour. The defendant's purchase was bounded on Seymour's land, and did not include any part of it. He is only bound to take the land which he agreed for, without reference to any mistakes which had been made in the running out and conveying the land to Seymour. The land which the defendant is bound to take, is all that part of lot number one, in great lot number two, which lies north of the lands sold and conveyed to Seymour, and no other.

It must be referred to a master to ascertain the number of acres in the farm, and the amount which is still due thereon, estimating the land at \$21 50 per acre, and computing interest from the 20th December, 1815; and on the coming in and confirmation of the master's report, the defendant must pay the amount reported due, with interest from the date of the report, and the complainant must convey the premises to the defendant by a good and sufficient deed, with the usual covenants of warranty and seizin, to be settled by the master, and the injunction to restrain the defendant from proceeding at law must then be made perpetual.

As the complainant insisted upon the defendant's taking

the two acres of land covered by the Seymour deed, which he was not bound to take under his contract, and the defendant declined paying interest, which under the contract the complainant was entitled to, neither party is to be allowed costs as against the other.

1828.

In the Matter of Howe.

*IN THE MATTER OF HOWE, EXECUTOR, &c., OF ANDERSON,
DECEASED.

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Corporations cannot act as trustees in relation to any matters in which they have no interest.

But where property is devised or granted to a corporation, partly for its own use and partly for the use of others, the right of the corporation to take and hold the property for its own use, carries with it, as a necessary incident, the power to execute that part of the trust which relates to others.

Where an executor upon sufficient grounds applies to the court for direction, he will be permitted to retain the costs of the application out of the property of the testator, not specifically bequeathed.

NICHOLAS ANDERSON, the testator, gave to the corporation of St. George's Church, in New York, a legacy of \$4,000, in trust that the same should be put out at interest, or vested in public stocks; and that the income thereof should be paid to his housekeeper for life, and after her death, the income thereof to be applied to the purchase of a church library, the support of a Sabbath school in the church, and other church purposes to which the church contributions may be applied, agreeably to the canons of the Episcopal church. The counsel of the executor advised him that the corporation could not act as trustees of the legacy during the life of the housekeeper; whereupon, he applied by petition to this court for direction, and the corporation, housekeeper and the residuary legatee joined in the application, and submitted their rights to the decision and direction of the Chancellor.

October 7th.

1838.

C. C. King for petitioner.*In the Matter
of Howe.*

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THE CHANCELLOR:—It is a general rule that corporations cannot exercise any powers not given to them by their charters or acts of incorporation; and for that reason they cannot act as trustees in relation to any matters in which the corporation has no interest.[1] But wherever property is devised or granted to a corporation, partly for its own use and partly for the use of others, the power of the corporation to take and hold the property for its own use carries with it, as *a necessary incident, the power to execute that part of the trust which relates to others.

In this case the substantial part of the legacy is for the benefit of the corporation; and the income thereof, after the death of the housekeeper, is to be applied to some of the purposes to which the rector, churchwardens and vestrymen are authorized to apply the general funds or temporalities of the church committed to their management. The testator had a right to limit his bounty to a part of the objects to which they might appropriate the general funds of the corporation. He also had a right to direct when the income should be applied for that purpose. If the corporation receive the legacy, it must be received charged with the payment of the interest or income to the housekeeper for life. The corporation must execute the trust in her favor, to enable them to obtain the fund which is afterwards to be appropriated to corporate purposes. The legacy must therefore be paid over to the rector, churchwardens and vestrymen, as the representatives of the corporators, who are bound to carry into effect the testator's will in respect to the same.

As there was ground for taking the direction of the court in relation to this legacy, and the executor having submitted the question in the cheapest possible mode, he is entitled to retain his costs of this application out of the property of the testator which is not specifically bequeathed.

[1] *Jackson v. Hartwell*, 8 John. 422.

1828.

REED v. THE BANK OF NEWBURGH.

Reed
v.
The Bank of
Newburgh.

A defendant, in a suit at law, who has a separate demand against the plaintiff which is not a subject of offset there, cannot have relief in Chancery unless the plaintiff is insolvent.

But if his demand arises out of the same transaction as that of the plaintiff, so that in equity the plaintiff would have no right to recover against him, and the defendant cannot avail himself of his defence at law, he will be relieved in Chancery.

Although a person has a perfect remedy at law to recover for the breach of an agreement connected with a note, if he cannot avail himself of it as a defence to an action on the note, he can come into Chancery to have the note cancelled, and to recover the balance, if any, which may be due him.

*In March, 1826, the defendants agreed to loan the complainant \$20,000 on his note, at 6 per cent., payable on demand, and for which he was to transfer stock of the Tradesmen's Bank, as collateral security, to the value of 10 per cent. above the loan, to be determined by the value of such stock in the market, and upon which stock it was agreed the complainant should have a proxy to vote for directors of the Tradesmen's Bank, and that no greater sum than \$5,000 of the note should be demanded or drawn for at sight in one day. In pursuance of this agreement, the loan was made, and the complainant transferred 450 shares of stock as collateral security to John S. Hunn, as cashier of the Bank of Newburg, and received from him a proxy to vote on those shares. An election of directors of the Tradesmen's Bank took place on the 3d of July, 1826, when the cashier Hunn, acting under the direction of the defendants, revoked the proxy, and himself voted for directors, against the will of the complainant, and for the purpose of giving to the defendants a controlling influence in the Tradesmen's Bank, against the interest of the complainant, and notwithstanding his remonstrances to the contrary. The defendants having violated their agreement by revoking the proxy, the complainant tendered to the cashier the

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October 7th.

1828. amount of his note and interest, and demanded a re-transfer
 Reed of his stock, which was refused. At the time of the said
 v. tender, and demand of the transfer, the stock was worth,
 The Bank of and was actually selling in the market, from 15 to 22 per
 Newburgh. cent. above par, and the complainant at that time purchased
 a large amount, and was compelled to pay at that rate for
 the same; but the stock has now depreciated, and is from
 20 to 30 per cent. below par; and since the depreciation of
 the stock, the defendants have demanded payment of a part
 of the loan, or additional security, and threaten to dispose
 of the stock at its present value, and after crediting the pro-
 ceeds thereof on the note, to prosecute the complainant for
 the balance. The complainant in his bill prayed that the
 defendants might be compelled to account for the stock at
 its value on the 3d of July, 1826, after deducting the loan
 and interest thereof up to that time; and that the note
 might be delivered up and cancelled; and for general
 relief.

[*217] *The defendants demurred, both as to the discovery and
 relief sought by the bill, on the ground of the want of equity.

H. Bleecker, in support of the demurrer, contended that
 this was not a case of fraud, but merely a violation of con-
 tract; that the complainant had a perfect remedy at law;
 that every matter of account was not entertained in Chan-
 cery; that to sustain a bill for an account, there must be
 mutual demands, not a mere set-off or a single transaction.
 He cited *Cooper's Pl.* 125, 139; 1 *Maddock*, 70, 205;
Post v. Kimberly, (9 John. R. 501;) *Dinwiddie v. Bailey*,
 (6 Ves. 136;) *Porter v. Spencer*, (2 John. Ch. R. 171.)

S. P. Staples, contra :—The complainant has not an ade-
 quate remedy at law. Where there are difficulties at law,
 Chancery will entertain jurisdiction. So, where at law a
 multiplicity of suits must be brought, relief will be given
 in equity. In the present case, there would be a difficulty
 in litigating the note at law. The complainant would be

compelled to pay the note before he could sue upon the agreement to transfer the stock. He could not offset his damages against the note. His remedy therefore being at law uncertain and difficult, the court will not refuse to entertain jurisdiction. The defendants are trustees with an interest, which trust they have violated. They took an unconscientious advantage of the complainant, in which cases Chancery always relieves. A court of equity frequently entertains jurisdiction in cases where the party has a remedy at law. It does so from its power to give mutual advantages. It has power in this case to order the note to be cancelled, whether a defence may or may not be made to it at law. The counsel cited, in support of his position. *Colt v. Netterville*, (2 Pr. Wms. 303, 4;) *Cud v. Rutter*, (1 Pr. Wms. 570;) *Lady Ormond v. Hutchinson*, (13 Ves. 51;) *Lyon v. Tallmadge*, (14 John. R. 513;) *Campbell v. French*, (2 Cox's R. 366;) *Clifford v. Brooke*, (13 Ves. 133;) *Evans v. Bicknell*, (6 Ves. 172;) *Davis v. Todd*, (4 Price, 176;) *Hamilton v. Cummings*, (1 John. Ch. R. 517, 523;) *Bromley v. Holland*, (7 Ves. 3.)

1828.
Reed
v.
The Bank of
Newburgh.

*THE CHANCELLOR:—It is doubtful whether the matters stated in the complainant's bill would afford him any valid defence to an action on the note in a court of law. Although he may have a perfect remedy at law to recover for the breach of the agreement by the defendants, if he cannot avail himself of it as a matter of defence to an action on the note, he has a right to come here for the purpose of having the note cancelled, and to recover the balance which may be due to him. If a defendant in a court of law has a distinct and separate demand against the plaintiff, which is not a proper subject of off-set there, he cannot generally come into this court for relief, unless the plaintiff is insolvent. His proper course is to pay the plaintiff's demand, and then prosecute for his own; but if his claim arise out of the same transaction or contract as that of the plaintiff, so that in equity the plaintiff never had any right to recover against him, if the defendant cannot avail himself of his

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1828. claim as a defence at law, he may come into the court for relief. He is not obliged to pay an unjust demand, although he may recover back a greater amount in damages in a suit instituted by himself.

Fulton Bank
v.
Sharon Canal
Company.

If the allegations in the complainant's bill are true, he has a right to insist that the defendants keep the stock, at its market value at the time they violated the agreement and refused to re-assign to him; and that they pay the balance, after deducting the amount of the loan and interest up to that time.

Demurrer overruled, with costs.

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*THE PRESIDENT, DIRECTORS AND COMPANY OF THE FULTON BANK v. THE SHARON CANAL COMPANY, THE NEW YORK AND SHARON CANAL COMPANY AND OTHERS.

As a general rule, a mere witness cannot be made a party defendant. But suits against corporations are exceptions to this rule. As they do not answer upon oath, the only means of obtaining a discovery from them is to make their officers and agents parties, and to compel such officers and agents to answer the bill.

The former as well as the present officers of a corporation can be made parties to a suit against such corporation, and compelled to make discovery of facts within their knowledge.

October 7th.

In March, 1827, the complainants filed a bill in this cause against the above-named corporations. They made George W. Brown, the former president, and Matthew Reed, a former director of these companies, parties to obtain a discovery of certain transactions, in which it is alleged they were engaged as such officers. Most of the transactions referred to are previous to September, 1826.

To this bill Reed put in a plea, alleging that previous to the 14th of September, 1826, he parted with and conveyed away all his interest in the stock of these companies; since

which time he has not been a director, stockholder or member of the finance committee, or had any interest in either of the companies.

1838.

Fulton Bank
v.
Sharon Canal
Company.

J. Hoyt for the complainants.

S. P. Staples for the defendant Reed.

THE CHANCELLOR:—The equity of the complainants' bill is not founded upon any interest which the defendant Reed has in the stock of the companies against which relief is sought. It depends upon the question whether the directors and agents of those companies had knowledge of, and sanctioned the manner in which the deposits were drawn from the Fulton bank, and whether the deposits thus drawn were applied to the purposes of those companies by the defendants Brown and Reed. This is one of the exceptions to the general rule that a mere witness cannot be made a party defendant.

*Corporations do not answer on oath, and the only way in which a discovery can be obtained from them is through the medium of their agents and officers who are acquainted with the transactions. In *Moodalay v. The East India Company and Morton*, (1 Bro. Ch. Rep. 469,) the secretary, having no interest in the company, was made a defendant, for the purpose of obtaining a discovery. And in *Wych v. Meal*, (3 P. Wms. 311,) Lord Talbot shows the reasons on which this exception to the general rule is founded. Those reasons apply as well to the former as to the present officers of the corporation, when the knowledge of the facts of which the discovery is sought rest only with such officers, and especially when it relates to their own official acts. The defendant Reed must answer the complainants' bill and make the discovery which is sought thereby. What is to be the effect of his answer as to the other defendants, and the final disposition of this suit as to himself, are questions which do not arise under this plea.

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Plea overruled with costs.

1828.

Hosford
v.
Nichols.

HOSFORD v. NICHOLS AND OTHERS.

Where a mortgagee parts with all his interest in the mortgage to a third person, but does not assign it, and he afterwards obtains his discharge under the insolvent laws, the mortgage will not pass to his assignees under those laws.

Where a contract for the sale of land in this state was made between two of its citizens, one of whom removed to Pennsylvania, where the contract was afterwards executed, by giving a deed and taking a mortgage on the premises to secure the payment of the purchase-money, in which mortgage the New York rate of interest was reserved, which was greater than that of Pennsylvania, it was held that the giving the deed and taking the mortgage was only a consummation of the original contract made in this state, and that the mortgage was not void for usury.

Whether a contract made in this state for the sale of lands in another state, upon credit, reserving interest at the legal rate of the state where the lands are situated, would be void if the rate of interest exceeded that allowed by our laws? *Quære*. [1]

As a general rule, interest is payable according to the laws of the place where the contract is made.

[*221]

*But where a contract is made in reference to the laws of another country, and is to be performed there, the interest is to be calculated agreeably to the laws of the place where the contract is to be performed.

Title to real estate can only be acquired or lost according to the law of the place where it is situated.

This rule applies to mortgages as well as to the deeds absolute.

The laws of other states must be proved, otherwise the courts of this state cannot take notice of them.

October 21st. PREVIOUS to the year 1802, and while Elisha Kane lived at Albany, he made a contract with J. B. Nichols to sell to him lot No. 82, in Marcellus, and in pursuance of the agreement, Nichols paid to the agent of Kane in Albany, about \$1,500 of the purchase-money. On the 28d of June, 1804, after Kane removed to Philadelphia, Nichols went there and obtained a deed of the lot, and gave back a mortgage for the balance of the purchase-money, conditioned to pay \$1,155 in two years thereafter, with lawful

See *Chapman v. Robertson*, 6 Paige, 627.

interest of the state of New York thereon, payable annually. E. Kane was indebted to his brother, James Kane, and to J. & A. Kane in a considerable amount, and shortly after the execution of the bond and mortgage, they were sent to James Kane, at Albany, and he continued to receive the payments thereon of Nichols, and he credited the proceeds to the account of E. Kane. Previous to June, 1806, Nichols sold and conveyed to divers persons the whole of the mortgaged premises, except 150 acres, and the purchasers and their assigns have ever since occupied and possessed the same under those conveyances. On the 23d of March, 1820, Nichols mortgaged to the defendant, Monk, 80 acres of the 150 then belonging to him, to secure the payment of \$369. In 1822, the owners of that part of the lot which had been conveyed by Nichols, made an agreement with James Kane, who then claimed to be owner of the mortgage, to purchase the same, for the purpose of protecting their titles, and enforcing the same against the 150 acres; and on the 4th of November, 1822, he procured an assignment from his brother Elisha, to Solomon Judd, of the bond and mortgage. Judd afterwards assigned the same to S. French and others, who subsequently assigned to the complainant. A suit was brought by the assignees in the *Supreme Court, in the name of Elisha Kane, on the bond; and in February, 1825, a judgment was recovered in that suit against Nichols, for the penalty of the bond, with costs. In July, 1825, the complainant filed her bill against the mortgagor, and against Monk, the mortgagee of the 80 acres, T. J. Nichols, a lessee of the 150 acres, and the judgment creditors of J. B. Nichols, to have the mortgage satisfied out of the remaining 150 acres, which, it was alleged, were amply sufficient for that purpose without resorting to the lands which had been previously sold and conveyed. The bill was taken *pro confesso* against the judgment creditors. The defendant, T. J. Nichols, claimed no interest in the premises, except as a lessee of the same, for three years, on shares. The defendants, Monk and J.

1828.

Howford
v.
Nichols.

[*222]

1828. B. Nichols, admitted the execution of the bond and mortgage, but insisted that the same were void because the rate of interest reserved exceeded the legal rate of interest in Pennsylvania. They also alleged, that in 1815, Elisha Kane failed, and assigned his property to assignees, and that the bond and mortgage were included in that assignment, and that he had no interest in the mortgage at the time of the assignment thereof to Judd. Monk also claimed to have the part of the 150 acres which was not included in his mortgage first sold, if a sale should be ordered.

Hosford
v.
Nichols.

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D. Kellogg, for the complainant:—There is no evidence that the rate of interest in Pennsylvania is less than in this state. The proof offered to establish this allegation of the defendants is parol. Such proof of a foreign statute is incompetent evidence. (*Kenny v. Van Horne and Clarkson*, 1 John. R. 394.) The defendants do not set forth the usurious agreement specially. This was necessary. (1 Saunders, 295, a. b.) The contract for the sale of the lot in question was made in this state, and in reference to the laws of this state. The rate of interest here must, therefore, govern. (*Fanning v. Consequa*, 17 John. R. 518; *Thompson v. Ketchum*, 4 John. R. 285.) Interest is to be calculated according to the laws of the place where the contract is made payable. (*Sir John Champant v. Ranclagh*, Precedents in Ch. 128; *Eakins v. East India Co.*, 1 Pr. Wms. 396; *Connor v. *Earl of Bellemont*, 2 Atk. 382; Fonbl. 2, 242; 2 Burr. 1077; 3 Atk. 727.) Kane is an incompetent witness to impeach the bond and mortgage, a recovery at law having been had upon the bond, and its validity thereby established. (*Van Schaick v. Edwards*, 2 John. Cas. 355.) The legal and equitable interest in the bond and mortgage is in the complainant. The only evidence of the proceedings under the insolvent laws of Pennsylvania, and of the assignments by Kane under those laws of all his real and personal property, is parol, which is inadmissible. (*Fox v. Reid*, 3 John. R. 477; *Willoughby v.*

Carleton, 9 John. R. 136.) The assignments by Kane under the insolvent laws of Pennsylvania did not pass any interest in the bond and mortgage, they having been previously delivered by Kane to his brother for a valuable consideration, and his equitable interest therein having passed on that delivery. (*Runyan v. Mersereau*, 11 John. R. 534.) It was not necessary to make all the grantees of J. B. Nichols, parties to this suit. It is proper only to make such persons parties as are parties to the interest involved in the issue, and who must necessarily be affected by the decree. (*Wendell v. Van Rensselaer*, 1 John. Ch. R. 349; *Cockburn v. Thompson*, 16 Ves. 325.)

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J. R. Lawrence, F. G. Jewett and J. Rhoads for the defendants:—The bond and mortgage in question were given in Pennsylvania, and a greater rate of interest was reserved thereon than was allowed by the laws of that state. They were, therefore, usurious and void. At all events, the legal rate of interest in Pennsylvania only can be charged. (*Van Schaick v. Edwards*, 2 John. Cas. 355; *Dewolf v. Johnson*, 10 Wheat. R. 367; *De War v. Span*, 3 Term R. 425.) The complainant took the assignment of the bond and mortgage as agent, or in trust for the grantees of J. B. Nichols. They ought, therefore, to have been made parties. Not having been made parties, the bill ought to be dismissed. (*Hopkins v. McLaren*, 4 Cowen's Rep. 677; *Malin v. Malin*, 2 John. Ch. R. 238; 7 John. Ch. R. 198, General Index.) All the interest of E. Kane in the bond and mortgage passed by the assignments made under the bankrupt law of the United States, and the insolvent laws of the state of Pennsylvania. The complainant, therefore, acquired no title under the assignment to him. If the decree should be in favor of the complainant, that part of the lot not covered by the defendant Monk's mortgage ought to be first sold.

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THE CHANCELLOR:—The objection for want of parties

1828. is not well taken. Although French and others are interested in the proceedings in this cause, they are not necessary parties. Their assignment to the complainant is absolute and unconditional; and although by the covenant therein they are responsible to her in case she does not succeed in recovering the money on the mortgage, it would have been improper to have made them complainants. Neither was it necessary to make all the owners of the land covered by the mortgage parties to the suit. It is stated in the bill, and admitted in the answers, that the one hundred and fifty acres remaining unsold is amply sufficient to satisfy the mortgage debt. No question of contribution can arise, as by the settled law of the court that part of the premises must be first applied to satisfy the mortgage. If the complainant chooses to rely upon that security alone, it does not lie with the defendants to object that she has omitted to increase the costs against them by unnecessarily making the owners of other parts of the lot parties to the suit.

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The objection that the mortgage was purchased with moneys raised by the sale of the lands of Nichols, under a void execution, is not supported by the proofs in the case. There is no judgment, execution or sheriff's deed produced to support the allegation in the answer. If the sale was regular, Nichols has no right to complain of the application of the purchase-money; and if the proceeding was void his title was not affected thereby, and he has no claim to the amount of the nominal bid.

The defendants have also failed in showing that nothing passed by the assignment of the mortgage to Judd. The objection of the complainant to the parol proof of the assignments by Elisha Kane is well taken. The original assignment should have been produced and proved by the subscribing *witness, or some evidence should have been given that it was impossible to obtain it. But if such evidence had been adduced, I think there is sufficient testimony in the case to show that in 1815 the equitable inter-

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est to the balance due on the mortgage belonged to James Kane, so that nothing could pass by the assignments under the insolvent laws of the United States, or of Pennsylvania. If so the complainant obtained both the legal and equitable title to the mortgage through the assignment made to Judd by Elisha Kane, with the assent of his brother, who had the equitable interest. As to the question of usury, I am inclined to think, under the circumstances, whatever may be the laws of Pennsylvania on the subject, that the mortgage reserving New York interest cannot be considered as usurious. In this case, the contract for the sale of the land was made in this state, and while both parties resided here. I think it is fairly inferable from the testimony that the subsequent giving of a deed and securing the balance of the purchase-money by a mortgage on the premises, was only a consummation of the original bargain made here, and not in pursuance of any new agreement to extend the time of payment.

Whether a contract made here for a sale of lands in another state, on credit, reserving interest at the legal rate of the place where such lands are situated, would be void, if such rate of interest exceeded the amount allowed by our laws, is a question which does not appear to be settled by any decision of our courts. The question was raised in *Van Schaick v. Edwards*, (2 John. Cas. 355,) and the judges were divided in opinion, and the cause was finally decided on another ground. In *Dewar v. Spark*, (3 T. R. 425,) the Court of King's Bench held that a bond given in England in pursuance of an agreement to give further time of payment for the purchase-money on a West India sale, reserving six per cent. interest, was usurious and void.

It is a general rule that interest is payable agreeably to the law of the place where the contract is made. But in *Fanning v. Consequa*, (17 John. R. 511,) the Court of Errors decided, that where a contract was made in reference to the laws of another country, and to be performed there,

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*the interest was to be calculated agreeably to the laws of the country where the contract was to be performed.

It is a well settled rule, that any title or interest in land or real estate can only be acquired or lost agreeably to the law of the place where the same is situated.[1] And this principle applies as well to mortgages as to conveyances absolute, (*Cutler v. Davenport*, 1 Pick. R. 81.) If a statute of Pennsylvania should declare all deeds executed in that state void, wherever the lands might be situate, unless they were executed in the presence of two witnesses, can there be any doubt that a deed of lands in this state, executed there, in

[1] The case of *Chapman v. Robertson*, 6 Paige, 627, is so analagous, that a statement of the points on which it was decided will repay the trouble of insertion. Robertson, a resident of New York, applied to Chapman, at his residence in England, for a loan of money, upon the security of a bond and a mortgage on lands in New York and at the legal rate of interest in that state, and it was agreed that upon the return of Robertson to New York he should execute his bond and mortgage, and have the mortgage duly recorded in the county where the lands were situated, and that Chapman, on receipt of the bond and mortgage in England, should deposit the money loaned with the bankers of Robertson in London, for his use: the bond and mortgage were executed, and the money received. Held, that the mortgage was a valid security for the loan according to the laws of New York; and that upon a bill filed there to foreclose the mortgage, Robertson could not set up the usury laws of England as a defence to the suit. And that, although the construction and validity of a contract, which is purely personal, depends upon the law of the place where the contract is made, unless it is made in reference to the laws of some other place or country where it is to be performed; yet the transfer of lands or other heritable property, or the creation of any interest in, or lien thereon, must be made in conformity to the local laws of the place where the property is situated.

Mr. Story dissents from some of the principles advanced in this decision, see *Conflict of Laws*, sec. 293, c. 1.

"The law of the place," says Chancellor Kent, "where the contract is made is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage in lands in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in regard to interest. When that is the case, the rate of interest of the place of payment is to govern." 2 Kent, 460. See also *D'Wolf v. Johnson*, 10 Wheat. 367; *Scofield v. Day*, 30 John. 102; *Thompson v. Pwies*, 2 Simons, 194; *Robinson v. Bland*, 3 Burr, 1077; *Boyce v. Edwards*, 4 Peters, 111.

the presence of one witness only, would be valid if it was afterwards acknowledged and recorded here agreeably to our own laws? In the case before me, the mortgage, after its execution in Philadelphia, was duly acknowledged in this state before one of the judges of the county of Onondaga. Whatever, then, may have been the legal effect of its original execution at Philadelphia, by this subsequent act of the mortgagor it became a good and valid lien upon the land for the security of the purchase-money, and New-York interest, agreeably to the laws of this state. It is also too late for the mortgagor to object that the bond was illegal and void. An action has been brought against him in a court of this state, and the judgment obtained thereon is conclusive evidence against him as to the validity of the bond.

Again, there is no evidence in this case to show that the bond and mortgage were not both valid by the law of the state where they were originally executed. E. Kane testifies that at the time of their date, and for some years previous, six per cent. was the legal rate of interest in Pennsylvania. But it does not appear that any law existed in that state which prohibited the parties from agreeing upon a higher rate of interest, or declaring securities void in which a higher rate of interest was reserved. And courts of this state cannot take notice of the laws of other states unless they are proved in the same manner as other facts, (*Thompson v. Ketchum*, (8 John. 189; *Church v. Hubbard*, 2 Cranch, 186.)

*The result of this opinion is, that the mortgage, in the hands of the complainant, is a valid and subsisting lien on the premises; and she is entitled to satisfaction of the amount due thereon, with interest, at the rate of seven per cent., after deducting the payments which have been proved, and the costs of this suit, out of that part of the 150 acres remaining unsold, and described in her bill of complaint, which is not covered by Monk's mortgage; and if that is insufficient, the 80 acres covered by Monk's mort-

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1838. gage must be sold, and the deficiency satisfied out of the proceeds thereof.

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There must be a reference to a master to compute the amount due to the complainant on her bond and mortgage, and to the defendant Monk, on his ; and on the coming in and confirmation of the master's report, the 150 acres, or so much thereof as may be necessary, must be sold in manner aforesaid on the usual notice, and out of the proceeds of the sale the master must pay to the complainant the amount reported due to her, with interest and costs ; and the defendant Monk will be entitled to his costs out of the residue. And if the 80 acres is sold, he will also be entitled to have the surplus, or so much thereof as is necessary, applied to satisfy the amount due on his mortgage ; and the residue of the purchase-money, if any remains, must be brought into court to abide the further order thereof. The master to execute deeds to the purchasers ; and the defendants, and all who have come into possession under them, must deliver up to the purchasers peaceable possession of the premises, on producing the master's deed and a copy of the order confirming the report of the sale.

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*JAMES v. HUBBARD AND OTHERS.

Where certain lands upon which a judgment is a lien are advertised for sale under such judgment, part of which lands have been previously sold by the debtor, and there are other lands of the debtor unsold, but the lien of the judgment would expire before such other lands could be advertised and sold, the owner of the judgment in such case, would not be bound upon the requisition of the purchaser from the debtor to abandon the sale of the lands so advertised.

The proper course of such purchaser would be to offer to pay the amount of such judgment and to take an assignment of the same ; and then by filing a bill against all the parties in interest before the expiration of the lien of the judgment, it seems such purchaser would be able to preserve the lien so far as to compel contribution upon equitable principles.

A judgment creditor cannot enforce his judgment against the land of a subsequent purchaser, so long as there are other lands of the debtor sufficient to satisfy the judgment.

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Where there are successive purchasers there is no contribution, and their lands are chargeable with the judgment against the debtor in the inverse order of alienation; that is, the last sold are to be first charged.[1]

In such cases the equities between the several purchasers are equal, yet the first purchaser, having the prior equity, is preferred.

The priority of equity is not determined by the date of the conveyance, but by the contract for the purchase of the land and the payment for the same.

A judgment creditor is not bound to decide at his peril upon the equitable rights of the owners of different portions of the land upon which he has a lien.

If the land of the purchaser who has a prior equity is first sold, he can compel the other purchasers to refund to him the amount they were benefited by such sale.

If a judgment creditor discharges from the lien of his judgment a part of the lands which ought to be first resorted to, the owner of other parts of the lands who has a prior equity will be entitled to a deduction from the judgment of the value of the lands so discharged, before his lands are resorted to for the satisfaction of such judgment.

ON the 4th of December, 1815, Jacob Tuckerman gave to the defendant Hubbard, a bond and warrant to secure the payment of \$1,020 and interest; on which a judgment was entered in the Supreme Court on the 15th of the same month. And by a written agreement of Tuckerman, the execution *was to be issued at any time, without the necessity of reviving the judgment by *scire facias*. On the 25th of December, 1816, a part of the lands of Tuckerman, which were subject to the lien of the judgment, were sold by him to George Dudley; and the complainant afterwards obtained title to the same by purchase under an execution against Dudley. On the 14th of February, 1817, Tuckerman conveyed to J. G. Curtis one-tenth, and to James McConnell two-tenths of ten acres; on the 28th of March, 1817, to D. Blakesley twenty-one acres; on the 16th of November, 1817, to J. N. Reynolds half an acre and fourteen and a half rods; on the 13th of May, 1818, to

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[1] *Crafts v. Aspinwall*, 2 Comst. 289; 2 R. R. (4th ed.) 625, sec. 92, 93.

1828. John Edgerton, three acres; on the 22d of July, 1818, to
James v. Hubbard. Elijah Philleo about half an acre, and another piece containing about one hundred and three acres and three-fourths; and on the 9th of July, 1819, seventy-nine and a half acres of land to Jesse Blodget, all of which lands were in the county of Madison. Tuckerman had another piece of land in Bridgewater, Oneida County, which was under a mortgage for the purchase-money; which mortgage has been subsequently foreclosed in Chancery. Hubbard also held a junior mortgage on the Bridgewater lot. In October, 1825, he caused an execution to be issued on his judgment to the sheriff of Madison, and directed J. G. Stower, his agent, to ascertain what lands were bound by the judgment, and to have the same advertised and sold. On the 25th of October, the sheriff advertised the above-mentioned lands in that county to be sold on the 6th of December then next. On the 25th of November, 1825, James procured a judge's order, staying all proceedings on the execution, for the purpose of enabling him to apply to the Supreme Court for directions to the sheriff as to the order of sale. This order was subsequently revoked, on the ground that the lien of the judgment would expire before the next term of the court; and the sale was adjourned, by direction of Stower, until the 10th of December, which, it was then supposed, was the day previous to the expiration of the lien of the judgment. On the 6th of December, 1825, the agent of the complainant informed Stower he should require that the *lands be sold in the inverse order of their alienation. At the time of the sale the complainant's agent gave a written notice to the sheriff, stating the order of alienation, which was correct, (except as to the date of two of the deeds, which did not alter the order of alienation,) and requiring that the lands should be sold in the inverse order of such alienation. He also gave notice to the sheriff that the judgment was a lien upon lands in Bridgewater, Denmark, and in Willsborough, in the county of Essex, and forbidding the sale of the lands advertised, until those lands

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should be first sold under the judgment. He also offered to bid on the lands aliened after the deed to Dudley the full amount due on the execution. After the pieces of land conveyed to Blodget, Edgerton, Blakesley, and the first piece conveyed to Philleo had been sold and bid in by the complainant's agent, Lockert Berry, the owner of the second piece conveyed to Philleo, claimed to have it exempted from the sale, and gave a written indemnity to the agent of Hubbard; whereupon Stower directed the sheriff to sell the lot conveyed to Dudley, and the same was bid in for Hubbard at \$950. Berry died in January, 1826.

On the 8th of September, in the same year, the complainant filed his bill in this cause against the sheriff and Hubbard and against the heirs of Berry, stating substantially the above facts, and also charging that the judgment of Hubbard was never due, or that it had been satisfied, and was kept up by fraud, for the purpose of charging the lands which had been conveyed by Tuckerman; and also charging that the latter had lands in Bridgewater, Denmark and Willsborough, which ought to be first subjected to the lien of the judgment, and praying that Hubbard might be decreed to give up the sheriff's certificate; that the sale of the complainant's lot might be declared void, and the sheriff enjoined from giving a deed, and for general relief.

The defendant put in his answer, denying all fraud, and fully explaining his transactions with Tuckerman; showing the judgment unsatisfied, except \$13, which, through mistake, he had omitted to credit; and showing a large balance due to him from Tuckerman, over and above the judgment; *also showing the foreclosure and sale of the Bridgewater lands under an old mortgage to L'Homme-dieu; and denying, that to his knowledge or belief, there were any lands in Denmark or Willsborough subject to the lien of the judgment; admitting that Stower was his agent in relation to the execution, but denying all knowledge of the order of alienation of the lands at the time of sale, except so far as the information was conveyed to Stower and

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the sheriff at the time of sale; and admitting, substantially, all the other facts, but alleging that the title of Tuckerman to the Berry farm was doubtful at the time of the sale, and that a recovery was had against the claimants of other lands held under the same title, which verdict was set aside on account of some formal defect in taking the testimony under a commission only.

A part of the heirs of Berry, who were infants, put in a general answer by their guardian, and the bill was taken *pro confesso* against the other defendants.

J. King & J. V. Henry, for complainant:—The lots of land subject to the judgment of Hubbard ought to have been sold in the inverse order of their alienation by Tuckerman, the debtor. (*Clowes v. Dickinson*, 5 John. Ch. R. 285; *Gill v. Lyon*, 1 John. Ch. R. 447; *Lanoy v. The Duke & Dutchess of Athol*, 2 Atk. R. 446; *Evertson v. Booth*, 19 John. R. 491; *Galatian v. Erwin and others*, 1 Hop. R. 49; *Hays v. Ward*, 4 John. Ch. R. 123.) The complainant has not lost his right of having the lots sold in the inverse order of their alienation by neglecting to apply to the court before the sale. All the complainant was bound to do, was to require the sheriff at the sale to sell in the order settled in equity; leaving the owners to ascertain such order among themselves. When the request was made to do equity, if any objection existed as to title or otherwise the judgment creditor should then have stated it.

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G. C. Bronson, for defendants:—Until the day of sale, neither Hubbard's agent or the sheriff had any information as to the order of sale. It is not against equity for a judgment *creditor to sell land first aliened by the debtor before resorting to land subsequently sold by him. The owner of the land first aliened must apply to Chancery before the sale, or he loses his right of having the lands bound by the judgment, sold in the inverse order of their alienation by the debtor. This principle is recognized in *Clowes v. Dick-*

inson, (5 John. Ch. R. 285,) and in *Gill v. Lyon*, (1 John. Ch. R. 447.) If the complainant had filed his bill and obtained an injunction, the lien would have been preserved by statute. A judgment creditor warrants the title to the land sold under his judgment by the sheriff. (1 R. L. 504, sec. 11.)

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THE CHANCELLOR:—The charge of fraud made against the defendant Hubbard, is fully met and disposed of by the answer and proofs. It is also denied in the answer, that Tuckerman had any lands in Willsborough or Denmark which were subject to the lien of the judgment, and no evidence is adduced to support that allegation in the bill. The situation of the Bridgewater lands is also fully explained in the answer. If there had been other lands in the counties of Oneida, Lewis or Essex, or even in the county of Madison, which were subject to the lien of this judgment, it could have made no difference in this case, as the lien of the judgment would have expired before those lands could have been advertised and sold. If the complainant wished to have those lands first applied, he should have offered to pay the amount of the judgment to Hubbard, and have taken an assignment of the same, if there was time to advertise and sell. But as there was not, it is probable, that by filing a bill against the several parties in interest before the expiration of the ten years, he might under the equity of the statute, (sess. 36, ch. 50, sec. 1, 1 R. L. 500,) have preserved the lien so far as to compel contribution according to equitable principles. At all events, if the remedy was gone as it respected himself, he had no right to require that Hubbard should lose the benefit of his lien on the lands which were advertised by the sheriff.

The only question then in this case is, what was equitable between the parties in relation to the lands actually *advertised by the sheriff of Madison? In *Clowes v. Dickinson*, (5 John. Ch. Rep. 285,) it was decided that a judgment creditor had no right to enforce his judgment against

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the land of a subsequent purchaser, so long as there was other land remaining in the hands of the judgment debtor or his heir at law, sufficient to satisfy the lien.[1] In that case, also, a pretty strong opinion is intimated by the court, that as between successive purchasers there is to be no contribution, but their lands are chargeable with the incumbrance in the inverse order of alienation: that is, the lands of the last purchaser are to be first charged. The eleventh section of the act concerning judgments and executions, (1 Rev. Laws, 503,) provides, that where lands or tenements, in the hands of several persons, shall be liable to satisfy any judgment or debt of record, and the whole, or more than a due proportion, shall be paid by or levied upon the lands of any one or more of them, the person aggrieved may have a writ out of Chancery, setting forth his or their grievance, directed to the justices of the Supreme Court, commanding them to hear the complaint, and to do justice to the parties, &c. I am not aware that any proceedings have ever been had under this section of the statute, or that a construction has been given to it in any of our courts. But there appears to be nothing in its provisions inconsistent with the principle assumed by Chancellor Kent, and insisted on by the complainant in this case. It frequently happens that judgments and mortgages are liens upon the lands of several persons where there is equality of equity, and where contribution would be just and proper; as in the case of several conveyances to different persons by the judgment debtor at the same time; or where the lands, bound by the judgment, are in the hands of the heirs at law of the debtor, or of different persons claiming under them.

Wherever the judgment creditor disposes of a part of the land held by the judgment, the purchaser has an equitable right to have the judgment discharged out of the residue of

[1] *Clowes v. Dickinson*, 9 Cow. 403; *Guion v. Knapp*, 6 Paige, 39; *Eddy v. Trarver*, 521; *Gill v. Lyon*, 1 John. Ch. 447.

the property. Although a subsequent purchaser has an equal equity to have the land which he has purchased and *paid for discharged from the lien of the judgment, as against the debtor, the first purchaser having the prior equity must be preferred. Where the equities are equal, and neither has the legal right, the maxim *qui prior est in tempore potior est in jure* prevails. (*Covell v. The Tradesman's Bank, ante*, 131.) It does not follow from what has been said, that the date of the conveyance is in all cases to determine the question as to the priority of equity between different purchasers. That is *prima facie* the time when the equitable right accrues. But if it should turn out that a purchaser had contracted for the purchase of his land and actually paid for the same, he would be preferred in equity to a subsequent purchaser, although the conveyance to the latter might be prior in point of time.

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The equitable rights as between successive purchasers being established, the next question which arises is, what are their rights as against the judgment creditor? In several cases the principle has been recognized, that where a creditor has a right to resort to two funds for the satisfaction of his debt, the party who has a subsequent claim upon one fund, only, may compel him to exhaust the other fund before he resorts to that in relation to which such subsequent claim exists.[1] (*Evertson v. Booth*, 19 John. 486; *The New York and New Jersey Steamboat Ferry Company v. The Association of the Jersey Company*, 1 Hopk. 460.) It is insisted by the defendant's counsel that this can only be done by a resort to the equitable power of this court in the first instance; and I am not aware of any case where it has been held that the creditor must, at his peril, decide upon

[1] *Halsey v. Reed*, 9 Paige, 446; *Ayres v. Husted*, 15 Conn. 504-519. The equitable doctrine in regard to the marshaling securities, is applicable only where one party has a lien or interest in two funds, with a right to resort to either or both, and another party has a lien on or an interest in only one of those funds. *The Farmers' Loan and Trust Co. v. Wabworth*, 1 Comst. 433.

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the equitable rights existing among the holders of different portions of the property on which he has a general lien for the satisfaction of his debt.

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If the agent of Hubbard had left the sheriff to exercise his own discretion in deciding upon the equitable claims of the different purchasers of the land, I should have no difficulty in this case in deciding that the purchase of the complainant's farm must stand, and that his remedy was against the other parties, to compel them to refund the purchase-money to *him, so far as they were benefited by such sale in discharging their own lands from the lien of the judgment. On the other hand, if the complainant had made all the owners of the lands, which he now insists should have been first sold, parties to this suit, I should have no difficulty in doing justice between them.

No decree can be made affecting the rights of the owners of the half acre sold to Reynolds, or the three-tenths of ten acres sold to Curtis and McConnell. All the lands were sold which had been aliened subsequent to the Berry farm. It appears by the pleadings and proofs, that all the right and title which Tuckerman ever had to that farm ought to have been sold before either of the small pieces, or the lands of the complainant were charged. And as the heirs of Berry are parties to this suit, the complainant's equitable claim against that farm can still be enforced. I shall, therefore, direct that the same be sold under the direction of one of the masters of this court, and that the proceeds of such sale be applied in satisfaction of the amount for which the complainant's lands were sold; and if there is any thing remaining after satisfaction of that amount, that it be applied in payment of the complainant's costs in this suit. But as it also appears, by the pleadings and proofs, that the title to that farm is in dispute, it must be sold at the risk of the purchaser. The complainant must also be at liberty to redeem his land from the sale to Hubbard, on paying to him the amount of the purchase-money with interest thereon, at the rate of seven per cent. per annum; deduct-

ing the \$18, which, by mistake, had not been credited on the judgment.

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It is stated in the proofs, although I have not been able to find any allegation of the fact in the bill or admission in the answer that the reason why the Reynolds' lot was not sold was, that there had been some agreement with Hubbard, by which that lot was discharged from the lien of the judgment. If such was the case, the complainant had a right to have the value of the lot deducted from the amount due on the judgment before his lot was sold. If, therefore, the Berry lot shall prove insufficient to satisfy the amount charged on the complainant's farm, with costs, as above mentioned, it must *be referred to a master to examine and report whether Hubbard had done any act by which the lien of his judgment on the Reynold's lot had been legally or equitably discharged, previous to the sheriff's sale; and if it had been so discharged, the master is further to report the value of that lot at the time of the sheriff's sale, allowing the owner to retain the possession thereof until the expiration of the time of redemption on sheriff's sales; and that on the coming in and confirmation of such report, the value so reported, with the interest thereof, or so much as may be necessary to satisfy the balance due to the complainants as aforesaid, be paid to him by the defendant Hubbard, or allowed towards the redemption of the complainant's land from the sheriff's sale.

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Where a British subject, being indebted, left England, and while on his voyage to this country, and before he arrived here, he was under the laws of Great Britain declared a bankrupt, and provisional assignees were appointed; it was held, that the assignment to such assignees divested the title of the bankrupt to the personal property brought with him to this country.

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And an injunction will lie, upon the application of such assignees, to restrain a third person from delivering the goods to the bankrupt, and also to restrain the latter from receiving or prosecuting for the same.[1]

And the commencement of suits against the bankrupt by his creditors in the courts of common law of this state will not defeat the effect of the assignment to his assignees.

October 21st.

THE defendant Abraham, is a British subject, domiciliated in England. In July, 1828, he left that country for the United States, bringing with him 24 cases of paintings, cabinet furniture and merchandize, and arrived in New York about the first of September, when the goods were deposited in the public store, under the charge of the defendant Thompson, as collector of the port. Shortly after Abraham left England, a commission of bankruptcy was taken out against him there, by virtue of which he was duly declared a bankrupt; and on the 8th day of August, J. Johnson, one of the *complainants was appointed by the commissioners provisional assignee. On the 24th of September, 1828, the complainants, the provisional assignee, and the creditors of Abraham, all of whom were British subjects and residents in England, filed their bill in this cause, and obtained an injunction restraining the collector from delivering the goods to Abraham, and restraining the latter from receiving or prosecuting for the same. Abraham put in his answer, neither admitting or denying the proceedings under the commission, but alleging that he left England in the lawful pursuit of his business, with a *bona fide* intention of returning, and denying that he was insolvent or had committed any act of bankruptcy.

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D. Graham, for the defendant, moved for a dissolution of the injunction on the bill and answer.

[1] On appeal, the Court of Errors held, that an assignee under a foreign commission of bankruptcy is not entitled before judgment to an injunction to restrain the bankrupt from receiving from the custom house here, goods which were in transit (on the high seas) at the time of suing out the commission. S. C., 3 Wen. 538.

H. Bleeker, contra.

1828.

Platore
v.
Abraham.

THE CHANCELLOR:—In the case of *Holmes v. Remsen*, (4 John. Ch. R. 460,) Chancellor Kent decided that an assignment by the commissioners of bankruptcy in England operated as a legal transfer of the personal property and choses in action of the bankrupt in this country, even as against a subsequent attachment taken out here by an American creditor, under the act against absconding and absent debtors. It is doubtful whether that decision, to its full extent, can be sustained. It was strongly questioned and ably opposed by Platt, J., in a case between the same parties, which subsequently came before the Supreme Court. (20 John. Rep. 229.) It also stands in opposition to the opinions of the state courts in Connecticut, Massachusetts, Pennsylvania, Maryland, and in both of the Carolinas, (Kirby's Rep. 313; 9 Mass. Rep. 350; 13 Mass. Rep. 146; 6 Binney, 353; 1 Harris & M'Henry, 236; 2 Haywood, 24; 1 Const. Rep. 283;) and to the decision of the Supreme Court of the United States in *Harrison v. Sterry*, (5 Cranch, 289,) and in *Ogden v. Sanders*, (12 Wheaton, 213.)

But the case before me steers clear of all these decisions. In the cases cited, the contest was between foreign assignees *and domestic creditors claiming under the laws of the country where the property was situated, and where the suits were brought. The question in those cases was, whether the personal property of the debtor was to be considered as having locality, for the purpose of giving a remedy to the creditors residing in the country where the property was in fact situated at the time of the foreign assignment. In this case, the controversy is between the bankrupt and his assignee and creditors, all residing in the country under whose laws the assignment was made. Even the property itself, at the time of the assignment, was constructively within the jurisdiction of that country, being on the high seas, in the actual possession of a British subject. Under such circumstances, the assignment had

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the effect to change the property and divest the title of the bankrupt, as effectually as if the same had been sold in England under an execution against him, or he had voluntarily conveyed the same to the assignee for the benefit of his creditors. If no act of bankruptcy has been committed, he must apply to the proper tribunal of his own country to supersede the commission; for while it remains in force the adjudication of the commissioners is conclusive against him as to that fact.

It probably was not necessary for the creditors to join with the assignee in this suit; but that affords no ground for the dissolution of the injunction.

By the sixty-ninth section of the English bankrupt act, (Statute 6, Geo. 4, ch. 16, sec. 69,) proving a debt under the commission by a creditor, is declared to be an election by him not to proceed against the bankrupt by action. Although the creditors in this case have prosecuted the bankrupt in the Superior Court of the city of New York, they will still be entitled, on relinquishing these suits, to prove their debts under the commission. If they elect to proceed under the commission, perhaps that court may consider it a sufficient ground to order a stay of proceedings in those suits, and to discharge the defendants without bail. But the institution of these suits by the creditors cannot prevent the legal effect of the assignment in changing the property in the goods and vesting them in the assignee for the benefit of the creditors generally.

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The motion to dissolve the injunction is therefore denied, with costs.

1828.

 Stafford
 v.
 Bryan.

STAFFORD v. BRYAN.

The statute of limitations is a good plea in bar in equity as well as at law.[1]
 Where the answer of the defendant is responsive to the bill, it is evidence in
 his favor, and is conclusive, unless disproved by more than one witness.

THE complainant filed his bill in this cause on the 21st October 21st. of December, 1826, setting forth, that in August, 1813, the complainant and his partners, John Stafford and George B. Spencer, who are since dead, together with the defendant, being desirous to raise money, the firm of Staffords & Spencer made a note to Bryan for \$11,000, which was indorsed by him and discounted at the Albany Bank, as an accommodation note of Staffords & Spencer. Bryan received \$3,000 of the proceeds, and was to pay a share of the note and discounts on each renewal, in proportion to the amount of the proceeds of the note which had been received by him. The note was renewed from time to time, and he continued to pay his share until the 14th of June, 1814, when he gave his note to Staffords & Spencer for \$821 24, payable on demand, with interest, for the balance of his proportion of the \$11,000, and they assumed the payment thereof to the bank. G. B. Spencer died in February, 1818, and J. Stafford in October, 1820. In the winter or spring of 1825 the note was lost, and the complainant charged that it afterwards came into the hands of the defendant. The complainant also alleged in his bill, that the defendant frequently during the life of his partners, and since their death, acknowledged that the note was still due, and promised to pay the same; setting out, also, particular times and places when and where the defendant had admitted his indebtedness and promised payment.

The defendant in his answer admitted the giving of the note under the circumstances stated in the bill, but denied

[1] See *Ward v. Van Bokkelen*, ante, 101-2.

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Bryan.

*all knowledge of its loss, or that he had seen the same since the alleged loss, or knew what had become of it. He also alleged that he verily believed he had long since paid the note, but how or in what manner, he was unable to state; and he insisted upon the statute of limitation as a bar to this suit. He also denied having at any time within six years previous to the commencement of this suit admitted his indebtedness, or promised to pay the note; denying specifically the several admissions and promises stated in the complainant's bill. He also denied that he had within the same period been called on by the complainant for payment, except that two suits had been commenced against him in the Supreme Court for the recovery of the note, one of which was discontinued, and in the other the complainant was non-suited at the trial, on the plea of the statute of limitations.

The cause was heard on pleadings and proofs.

J. Lansing, for the complainant:—The statute of limitations does not begin to run against a note payable on demand, until an actual demand is made. The defendant has admitted his indebtedness within six years, before the filing of the bill. Presumption of payment is repelled by the fact that the defendant was not in a situation to pay. (*Fladong v. Winter*, 19 Ves. 198.) The acknowledgment in the answer of the defendant is sufficient to take the case out of the statute. The defendant admits he gave the note, but says he believes it has been paid. This admission will revive the debt, if it be proved that the note has not been paid. (10 John. R. 35; 13 John. R. 510.)

S. Dutcher, for the defendant:—An acknowledgment of the original debt does not take a case out of the statute of limitations. The acknowledgment must go to the fact that the debt is still due. An acknowledgment, to take a case out of the statute, must be consistent with a promise to pay. The counsel cited *Clementson v. Williams*, (8 Cranch's R.

72;) *Smith v. Freel*, (Addison's K. 291;) *Danforth v. Culver*, 1838.
 (11 John. R. 146;) 3 John. Ch. R. 196; *Kane v. Bloodgood*,
 (7 John. Ch. R. 118;) *Swan v. Lovell*, (2 Barn. & Ald.
 759;) *Hellings v. Shaw*, (7 Taunt. R. 611, 608;) *Beale v.*
**Nind*, (4 Barn. & Ald. 572;) *Portington v. Butcher*, (6 Esp.
 R. 68;) *Brandram v. Wharton*, (1 Barn. & Ald. 463;) *Bell*
v. Roseland, (Hardress' R. 301;) *Wetzell v. Bussard*, 11
 Wheat. R. 309 and note;) *Sands v. Gelston*, (15 John. R.
 511;) *Murray v. Coster*, (4 Cowen's R. 617;) *Rosevelt v.*
Mark, (6 John. Ch. R. 266;) *Battley v. Faulkener*, (8 Barn.
 & Ald. 288;) *Danforth v. Culver*, (11 John. R. 146;) *Law-*
rence v. Hopkins, (13 John. R. 288;) *Green v. Rivet*, (2
 Salk. R. 422;) *Coltman v. Marsh*, (8 Taunt. R. 380;) *Lacon*
v. Briggs, (3 Atk. R. 105;) *Richards v. Maryland Ins. Co.*,
 (8 Cranch, 93;) *Hovenden v. Lord Annesly*, (2 Scho. &
 Lef. 629.)

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v.
Bryan.

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THE CHANCELLOR:—It is unnecessary in this case to express any opinion as to the probability of the note's being paid. The existence of the note being once established, and its loss sufficiently proved, the complainant must recover, unless the defendant can establish the fact of payment, or the recovery is barred by the lapse of time. By a reference to the cash book of the complainant, (exhibit Y,) it appears that in June, 1814, the defendant is charged with \$2,110 41, cash, and credited by discounted note \$987 17, cash on check \$300, and by note on demand in full, \$821 24, which last is probably the note in controversy in this cause. It appears, also, from the same book, that there were large cash dealings between the parties for one or two years afterwards, amounting to more than \$8,000 on each side. But if the note in question was included in any of the settlements which took place between the parties, no reason is given why it was not delivered up. On the contrary, it appears by the testimony of Lewis Benedict that a note precisely answering the description of the note in the complainant's bill, except that it was not upon

1828. interest, was in the store of Staffords, Spencer & Co.,
 Stafford among the papers belonging to the former firm of Staffords
 v. & Spencer, until and after the month of March, 1819, at
 Bryan. which time he presented it to the defendant, who promised
 to give his note for the same, payable on the 1st of Sep-
 tember thereafter.

[*242] *The only question, therefore, in this cause is, whether
 the recovery is barred by the statute of limitations. This
 suit was not commenced until nearly eight years after the
 acknowledgment and promise to Benedict; and although
 the complainant commenced two suits in the Supreme
 Court in the meantime, one of which was discontinued,
 and in the other he was nonsuited because he could not
 then prove sufficient to take the case out of the statute,
 neither of those suits can avail him any thing here.

The defendant is called upon by the complainant to an-
 swer, whether he has not admitted his indebtedness, or
 promised to pay this demand within six years previous to
 the commencement of this suit. In his answer, the defend-
 ant explicitly denies both; and the answer being respon-
 sive to the bill, is evidence in his favor, and must be con-
 sidered conclusive, unless disproved by more than one
 witness. If, therefore, the testimony of the complainant's
 sons can be reconciled with the truth of this answer, it
 puts the question at rest. Joab Stafford testifies to a con-
 versation with the defendant at his store, where he went to
 buy fur caps, in which the defendant admitted he owed his
 father a good deal of money, and wanted him to trade it
 out in furs, &c.

In opposition to this, the defendant's son testifies that
 the fur caps were purchased of him when his father was
 not present, and he produces the original entries in the
 books, to show the articles were charged directly to Joab
 Stafford, and not to his father. The same is substantially
 the case as to a similar conversation testified to by Spencer
 Stafford, junior. It also appears that at the times testified
 to by these witnesses, there was an outstanding account

against the defendant in favor of the complainant. Under these circumstances, if the complainant's sons are correct, and the defendant's sons incorrect, as to the facts, their testimony is not inconsistent with the truth of the defendant's answer, as these conversations may have related to the unsettled account. Without going into a detail of all the contradictory testimony on this subject, it may be sufficient to state that although great exertions were made to obtain testimony to take the case out of the statute, no such testimony was given on the trial at law. *There is not, therefore, sufficient in this case to satisfy me that the defendant has, within six years before the commencement of this suit, admitted that he owed or promised to pay the note in question; and the admission in his answer of the giving the note, accompanied with the declaration of his belief that it had been paid, is certainly not sufficient to take the case out of the statute of limitations. (*Clementson v. Williams*, 8 Cranch, 72.)

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v.
Jenkins.

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The complainant's bill must therefore be dismissed with costs.

JENKINS AND ANOTHER v. JENKINS AND OTHERS.

Where there has been negligence or improper conduct on the part of a trustee, and the fund is in danger, the appointment of a receiver upon the application of the *cestui que trust* is a matter of right.

In this case, *J. Sudam*, on behalf of the complainants, who were heirs and legatees, moved for the appointment of a receiver upon the ground of the insolvency of the executors of the estate, and of their misapplication of the property in their hands belonging to such estate.

J. King and *H. Blecker*, contra, contended that the office of executor was a personal trust, and unless the fund was

1828. in great danger, as in case of the insolvency or insanity of
 Jenkins the executors, a receiver would not be appointed. (*The*
 v. *Orphan Asylum Society of the city of New York v. McCartee*
 Jenkins. *and others*, 1 Hop. R. 435; 12 Ves. 4; 14 Ves. 216, 266.)

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THE CHANCELLOR:—The appointment of a receiver rests in the discretion of the court in all cases where executors have become bankrupt, or wasted, or misapplied the assets, or where any part thereof has been lost through their misconduct or negligence.[1] *Taylor v. Allen*, 2 Atk. 213; *Andrews v. Powys*, 2 Bro. P. C. 476. Anonymous, 12 Ves. 4; *13 Ves. 266.) And if the fund is in danger, it is a matter of right to have a receiver, whenever there has been any negligence or improper conduct on the part of the trustee.[2] In this case there has been great and unnecessary delay and negligence in closing the administration of this estate. From the affidavit read on the part of the defendants, some of the heirs have received and been permitted to retain large sums over and above their distributive share. Some of the executors, at least, have misapplied the funds belonging to the estate, and three out of the four are insolvent. A receiver must therefore be appointed as it respects them, if the solvent executor consents to act with such receiver; and if he does not consent to such appointment, it must be referred to a master to appoint a receiver generally. And the executors must deliver over to such receiver on oath, under the direction of a master, all books, vouchers, securities and title deeds belonging to the estate in their custody, or under their control, and all property and moneys in their hands belonging to the estate.

[1] As a general rule, an order for a receiver will not be granted, *ex parte*, except under urgent circumstances. See *Sandford v. Sinclair*, 8 Paige, 373; *Gibson v. Martin*, 8 id. 481.

[2] See *Hill on Trustees*, 212; *Hovers v. Havers*, Barn. 23; *Bainbriggs v. Blair*, 10 Law Journ. (N. S. Chanc.) 193; *Calhoun v. King*, 5 Ala. 523; *Beverly v. Brooks*, 4 Gratt. 208.

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Pierce
v.
Nichols.

PIERCE v. NICHOLS.

Where there is a contract for the purchase of land, and the person contracting to sell declines executing the contract, upon the ground that he is unable to give a good title, and the purchaser files his bill to compel the defendant to complete the contract, or to rescind it; if the defendant is able to give a good title at the time of the decree, the complainant will be compelled to accept it.

But the defendant will be decreed to pay to the complainant interest upon the purchase-money paid by him for the land, from the time a conveyance was demanded by the complainant.

IN May, 1822, the defendant bought of the plaintiff a October 21st. bond and mortgage, for which he paid a part in money, and for the residue amounting to \$1,750, he agreed to convey to him 584 acres of land in North Carolina, to be located in contiguous lots as soon as the survey, which it was alleged was then making, should be completed. After the survey, the complainant's agent selected the lots, which location was *assented to by the defendant; but he declined conveying the same, as he could not give a good title on account of an outstanding mortgage on the premises, proceedings to foreclose which were then pending. But he promised to procure a good title as soon as the foreclosure was completed. He was called upon from time to time for the conveyance by the agent, and by the attorney for the complainant, until the latter part of 1826, when this bill was filed, alleging fraudulent misrepresentations and concealment on the part of Nichols, and a breach of his contract to convey; and praying that he might be compelled to re-assign the bond and mortgage, or account to the complainant for the \$1,750 and interest, or for such other relief as his case entitled him to.

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In April, 1827, the defendant put in his answer, denying all fraud, or fraudulent misrepresentations, or concealment, and insisting that he had a good title to the lands, and that

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 v.
 Nichols.

the same was redeemed and discharged from the mortgage, and offering to convey the same according to the contract; alleging that he had been always ready and willing to convey, and had offered to the agent and attorney of the complainant to convey. The cause was brought to hearing on pleadings and proofs.

J. & L. Hoyt, for complainant, cited 1 John. Ch. R. 150; 2 Equity Cas. Ab. 5; Cooper's Rep. 308; 1 Mad. Ch. Pr. 262.

P. Ruggles, for defendant.

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THE CHANCELLOR:—All fraud in the making of the original contract is denied in the answer, and there is no proof to support this allegation in the bill. The complainant has therefore no right to claim a re-assignment of the bond and mortgage, or the repayment of the purchase-money on that ground. If he seeks a repayment on the ground of a breach of the contract, his remedy is in a court of law. From the testimony taken in this case it is satisfactorily established, that the defendant either could not or would not, give a good title to the complainant, at the several times when the same *was demanded by Dwight and Hoyt, the agent and attorney of the complainant. But in this court it is sufficient if the party is able to make a good title at the time of the decree. (*Seymour v. De Lancey*, 8 Cowen, 445.)

The complainant had a right to file his bill to compel the defendant to complete his contract, or to have it rescinded and to have the purchase-money restored. By his answer, the defendant consents and offers to execute the contract; and although he was not then in a situation to give a good title, yet, from the subsequent release from Deponceau, and the deed from Brunson and wife, which were exhibited on the hearing, it is probable that he can now give a good title to the lands selected and agreed upon between him and the

agent of the complainant in 1824. The complainant is not bound, however, to take that title until it has been examined and passed upon by a master. If the defendant can give a good title, the complainant must now accept of it, together with an equitable compensation for the delay; and if the defendant cannot give such title, he must refund the consideration money and interest.

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Peck
v.
Hamlin.

It must therefore be referred to a master to examine and report whether the defendant can give a good title to the lands mentioned in the complainant's bill, as the same were selected and located by the agent of the complainant, and more particularly described in exhibit B, annexed to the deposition of Henry Dwight, and in the deeds from Arthur Brunson and wife to Perkins Nichols, and from Perkins Nichols to the complainant, read on the hearing of this cause. And on the coming in and confirmation of the master's report, if it shall appear that the defendant cannot give a good title, he must pay to the complainant the \$1,750 and interest thereon from the date of the original contract. But if it appears he can give a good title, he is to convey the premises by a good and sufficient conveyance, to be approved of by a master, if the parties cannot agree respecting the same; and also pay to the complainant the interest on the purchase-money from the time the conveyance was demanded on the 15th of April, 1824, until the time of the execution of such conveyance; and in either case, that he pay to the complainant the costs of this suit, to be taxed.

*PECK v. HAMLIN AND OTHERS.

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Where a defendant is examined by the complainant, in relation to the amount due the complainant, on account of certain property sold by the defendant on commission, it is not sufficient for the defendant to refer to his books of account, produced before the master; but he must give the best

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answer he can from recollection and information, aided by a recurrence to the books and papers, immediately within his control and possession, accompanied by such explanations, responsive to the questions put, as are necessary to prevent improper conclusions being drawn from his answers.

Nov. 10th.

THIS case came up on exceptions to the master's certificate of the sufficiency of the examination of the defendants in the master's office. The object of the examination by the complainant was to ascertain the amount due on account of the proceeds of glass received by the defendants, to be sold on commission. By the interrogatories, the defendants were required to answer, whether the several sums of money mentioned in a schedule annexed, were received by them at or about the times therein mentioned, for glass sold on account of the complainant. Some other interrogatories were also put to the defendants, the sufficiency of their answers, to which depended upon the same principle. They answered in substance, that they recollected some of the sales, particularizing them; but that as to the others, they did not recollect of the sales being made, or the moneys being received, &c., nor were they informed thereof; but that all sums of money or proceeds received on account of the sales of the glass, according to their best recollection, and as they believed, were mentioned, and entries thereof contained in their books of account, or some of them, which they had already produced before the master; and that such entries contained the dates and sums precisely, and the number of the boxes sold; that they have, at different times, seen the entries in the said books, but they do not recollect, and are not informed of the particular contents of any such entries.

M. Dyckman, for complainant.

C. F. Grim and *A. S. Garr*, for the defendants, relied upon the case of *White v. Williams*, (8 Ves. 198.)

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*THE CHANCELLOR:—The struggle between the parties in this case appears to be, whether the complainant shall

be compelled to produce the defendant's books in evidence, in which case all the entries therein will be taken together, or whether the defendants shall be compelled to look into the books, and then answer as to the particulars referred to in the interrogatories.

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The case of *White v. Williams*, (8 Ves. 193,) is relied upon by the defendant's counsel to sustain the answers; but I think that case does not settle the principle contended for here. There is, indeed, in that case, an intimation, that if the defendants should answer that they have laid the accounts in the master's office, and that those accounts enable the plaintiff to learn as much as they themselves know of them, it might be sufficient; but Lord Eldon, even as to that expressly declines to give any decided opinion.

In this case, the defendants are not interrogated as to the sales of the glass generally, or as to the amount of such sales. They are called upon to answer specifically as to the items of charge contained in the schedule annexed to the interrogatories. To these inquiries, the defendants are bound to give the best answers they can from their recollection and information, aided by a reference to the books and papers immediately within their control and possession, with such explanations fairly responsive to the questions put, and which are necessary to exclude any improper conclusion to be drawn from those answers, as they may be advised to make. If, on an examination of their books, they are unable to answer these questions, or to recollect anything about it, except from the fact that there is an entry in the books respecting the same, they may then annex a copy of the entries to their answer, or refer to the books in the master's office, specifying particularly the books and pages, or other references by which the information may be obtained by the complainant, and showing that the entries are so made therein that they will be as intelligible to other persons as to themselves, and showing that they have no other knowledge on the subject. (*Purcell v. McNamara*, 12 Ves. 178.)

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In the Matter
of the Frank-
lin Bank.

I think the exceptions to the sufficiency of the examination are well taken, and they must be allowed. But as exceptions are *not to be encouraged, where the master is satisfied with the sufficiency of the examination, the complainant's costs on these exceptions must abide the event of the suit.

IN THE MATTER OF THE PRESIDENT, DIRECTORS AND COMPANY OF THE FRANKLIN BANK IN THE CITY OF NEW YORK.

The depositors of money in a bank are only general creditors of the corporation, and in case of a failure of the bank, they are not entitled to a priority of payment over bill holders or other creditors.

Nov. 10th. . THIS was a motion made in behalf of the depositors of money in the Franklin Bank for an order directing the receiver to pay to them the amount of their deposits, before any distribution was made of the funds of the bank among its general creditors.

D. B. Ogden, for the depositors:—The receiver represents the directors of the bank. The directors are the mere agents of the stockholders; and the stockholders are in principle co-partners in all respects, except in not being liable beyond the capital stock of the company. A deposit is a trust confided to the directors of the bank. The directors are trustees, and the depositors *cestui que trusts*. By this trust, the directors are bound to pay to the depositors the amount of their deposits, whenever they shall draw for the same. This court will protect the rights of the depositors and cause this trust to be executed. In equity, the rule undoubtedly is, that funds are to be equally divided among creditors in proportion to their debts. But these debts are to be paid only out of the property of the debtor,

not out of property belonging to others in his hands. Where a factor becomes insolvent with the property of his principal in his hands, the creditors of the factor cannot resort to such property for a satisfaction of their debts. So an agent cannot pledge the property of his principal for his individual debt. (*Bay v. Coddington*, 5 John. Ch. R. 54; *Rodriguez v. Heffernan*, 5 John. Ch. R. 417.) Property held in trust does *not in case of the bankruptcy of the trustee, pass to his assignees for the payment of the debts of the trustee. So the creditors of the Franklin Bank can only be paid out of the property of the company, not out of the money deposited with the bank. Suppose a deposit of plate, the bank could not sell it to pay their debts. But it may be said that money could not be identified like plate, unless kept in a separate bag, and that, therefore, at law trover would not lie for it, unless it could be so identified. This rule does not exist in equity. There the depositor of money has the same right to it as if it had been kept in a separate bag, or it had been a specific chattel. A depositor is not a lender to the bank. He does not intend to incorporate his money with the funds of the company. He deposits it merely for safe keeping. He receives no interest for it, and gains no advantage by the deposit. He relies upon the integrity of the directors, and not upon the capital stock and funds of the bank, for the repayment to him of the sum deposited. On the other hand, the bill holders take the bills of the bank in the ordinary course of business. They receive an advantage by it, and derive a profit. They rely for the payment of the bills upon the capital stock of the bank, and upon its ability to pay its debts, not upon the deposits in the bank. The statute (Laws of N. Y. of 1825, p. 448) under which this proceeding against the Franklin Bank was instituted, and which directs this court to sequester the funds of the bank, and to distribute them among the creditors, does not impair the right of depositors to a preference, as depositors are not creditors, but *cestui que trusts*. The statute provides that the debts of the

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1838. bank shall be paid out of its assets. Deposits are not assets.
 In the Matter Upon an execution against a miller, the wheat of his cus-
 of the Frank- tomers, though mixed with his own, could not be sold
 lin Bank. on the execution, (*Seymour v. Brown*, 19 John. 44,) be-
 cause it is a deposit in trust. For the same reason, the de-
 posits in a bank cannot be applied to the payment of the
 debts of the bank.

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S. A. Foot, contra:—The statute under which these pro-
 ceedings are had disposes of this question. It provides two
 modes of proceeding against insolvent corporated *compa-
 nies. The fifth section requires the court to sequester the
 funds, and to distribute them equally among the creditors
 of the bank. The seventeenth section authorizes the court,
 upon the application of a creditor of the bank, to issue an
 injunction against the officers and stockholders of the com-
 pany, and to appoint a receiver, and to cause a distribution
 of the funds to be made among all the fair and honest
 creditors of the bank. This section omits the word equally.
 This, however, can make no difference, as both these sec-
 tions are to be construed *pari materia*. It is within the
 policy of the act to secure an equal distribution of the funds
 among the creditors. The sixth section prohibits all as-
 signments by the bank in contemplation of insolvency.
 An assignment by the bank in favor of the depositors
 would have been void. The debtor of a bank cannot, after its
 insolvency, purchase in its bills, and make them the subject
 matter of off-set. It is a rule in equity that creditors are to
 be paid equally, without giving any preference to creditors
 by specialty. The like rule prevails where all the real es-
 tate of one deceased is sold for the payment of debts by the
 order of a surrogate. The same rule exists in England,
 under the bankrupt law. There, the depositors with pri-
 vate bankers, who become bankrupt, are not entitled to
 any preference. The depositors place their money in the
 bank, under an implied agreement that the bank may use
 their deposits in its business. The bank derives a profit

from these deposits. The depositors gain an advantage by the safe keeping of their money from fire and robbery. They also, in consideration of their deposits, expect and receive facilities for loans from the bank. But the bill holders derive no profit from taking the bills. They receive them because the laws make them a part of the currency; and they receive them upon the ground that the depositors by their deposits gave a credit to the bank. To give a preference to the depositor over the bill holder would be against the sense of the community, and would impair the value of bank paper. The argument that where there is a specific deposit, the depositor has a preference, shows that where the deposit is not specific, no preference can be given. A depositor, to be entitled to a preference, should seal up his money in a package. Upon such deposits, banks do not issue notes; but they always do upon general deposits. Wherever the money of a principal has gone into and become mixed with the funds of the agent, it cannot be withdrawn. In such case, the principal can only be paid *pari passu* with the other creditors. So wherever the property of a *cestui que trust* cannot be traced specifically in the hands of the trustee, it cannot be protected from the creditors of the trustee. So in this case, as the money of the depositors has been mixed with the funds of the bank, and cannot be specifically traced, it must form a part of the common fund, to be distributed equally among all the creditors of the bank in proportion to their debts.

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of the Frank-
lin Bank.

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THE CHANCELLOR:—By the report of the receiver, it appears that at the time he took the concerns of the bank into his hands, the amount of moneys actually remaining in deposit, including the bills of other solvent banks, was only \$7,957 88; while the amount of balances on the books of the company, standing to the credit of individuals and other banks, usually denominated deposits, was \$250,671; of which sum, \$84,000 was due to other banks.

1828. This amount of deposits has been reduced by off-sets, &c.,
In the Matter about \$35,000, leaving the estimated amount of debts due
of the Frank- from the bank, \$340,000; of which, \$125,000 belongs to
lin Bank. bill holders, and the residue to depositors. It is supposed
the assets of the bank will not be sufficient to pay more
than fifty per cent. on the gross amount of such debts.
The depositors claim a priority of payment; and if that
claim is allowed, they will obtain about eighty per cent. of
their debts, and the bill holders will receive nothing. The
receiver, as the representative of all parties in interest, has
very properly submitted the claims of the bill holders, who
are numerous and widely dispersed, to an equal share of
what may be saved from the wreck of the institution. The
question has been fully and ably argued on both sides, and
I have given to the subject the consideration which was
demanded by the importance of the principles involved
therein.

[*258] *Many cases of extreme hardship and of great individual
distress and suffering must exist among every class of cred-
itors, and even among the stockholders. The misfortune
of every failure of this kind is, that the loss generally falls
upon those who are least able to bear it; upon the laboring
class of community; upon the aged and infirm, the friend-
less and unprotected, whose little all is holden in bills, left
in deposit, or vested in the stock of such institutions. But
cases of individual hardship must not be permitted to influ-
ence the opinion of the court when deciding great general
principles.

The first question presented for consideration is, whether
the depositors have a legal right or equitable claim to pri-
ority of payment; and certainly, at the first blush, it does
appear reasonable that those who have deposited their
money in a bank for safe keeping should be preferred to
those who have taken the bills of the institution in the or-
dinary course of business. It therefore becomes necessary
to examine the principle on which this supposed right of
preference is founded. It is undoubtedly supposed to be

based upon the great and leading principle of equity, that the property of one person, in the hands of a bankrupt, shall not be taken to pay the debts of another. It is on this ground that property of the principal in the hands of agents or factors cannot be taken to satisfy the debts of the latter: and the former has a right to claim the proceeds of his property so long as it can be traced and identified. (5 John. Ch. R. 417; 5 Ves. jun. 211.) It is therefore necessary for the decision of this question to ascertain the nature of these deposits, and see whether they come within this principle.

So far as I have been informed on the subject of banking operations, the greatest portion of the debts of a bank, usually denominated deposits, are not moneys actually deposited there for safe keeping. If such was the case, the depositor could always guard against the effect of an insolvency of the institution by making a special deposit; that is, by depositing his money in a box or bag, or by affixing some mark upon it, by which it could be distinguished from the general funds of the institution. If he did so, the bank would have no right to make use of it; and officers or agents who should convert *it to the general purpose of the institution, without the consent of the depositor, would make themselves personally liable for the same. The depositor might also follow the money into the hands of third persons, who had received it with a knowledge of his rights, or who had not paid an equivalent therefor in the ordinary course of business. (*Coddington v. Bay*, 20 John. R. 687.) Every regular dealer with a bank has an open running account upon the books of the institution. In this account he is credited with all sums paid by him into the bank, whether the same are in specie, in checks, or in bills, on the same or other banks. In that account he is also credited with the proceeds of bills or notes discounted or collected for him; and in the same account he is charged with all checks drawn by him on the institution, in favor of himself or others, and with all other claims which are properly

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of the Frank-
lin Bank

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lin Bank.

chargeable against him by the bank. If there is a balance due to the bank on this account, it is called an overdraw-
ing, and the aggregate of balances due from the bank on these several accounts, is entered in the statement book as the amount of deposits. Hence, it sometimes happens that a person becomes a depositor in a bank without adding one cent to the funds. Thus, if the officers of the bank permit one of their customers to overdraw his account, and the check is placed to the credit of another, the latter becomes a depositor, although the drawer of the check is insolvent and unable to pay his overdraw. And on the principle of preference contended for here, if another person had at the same time deposited an equal amount of specie and taken bills of the bank in lieu thereof, such depositor of a worthless check would be entitled to the whole of that specie, to the exclusion of the bill holder who had actually deposited the same.

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Whenever money is specially deposited in a bank for safe keeping, it is at the risk of the depositor. If the same is stolen, lost or destroyed without any fault on the part of the officers of the bank, he must sustain the loss. Not so with the general depositor. The money, checks or bills which he deposits become the property of the bank, and he becomes a creditor. If they are stolen, lost or destroyed, or become of no value, the bank sustains the loss, and he is still a creditor. *He has no claim upon the money or bills deposited. The officers may use them as they please for the general purposes of the institution, and he is to all intents a general creditor of the bank. There is an implied assent on the part of the depositor, and the agents of the institution are legally authorized to issue bills and discount notes on the credit of such deposits. The depositor, therefore, has no valid claim to be paid in preference to the bill holders, who are also general creditors.

One of the leading doctrines of this court is, that equality is equity; and in all cases of bankruptcy, the creditor who claims a preference must show a legal right to, or a specific

lien upon the fund claimed. The injustice of giving the depositors a preference over the bill holders is strongly exemplified in the case before me. But a very small portion of the fund to be distributed could possibly have been the proceeds of deposits in the bank. The money found therein did not exceed one twenty-fifth part of the amount due to depositors. And a very considerable part of the fund to be distributed will arise from the sale of real estate purchased many years since, probably with a part of those very bills which were in circulation when the bank stopped payment. Having arrived at the conclusion that the depositors have no legal or equitable claim to priority of payment, it becomes unnecessary to examine the question whether the act of April, 1826, requires an equal distribution of the property and effects of the institution among all the creditors. It is sufficient on this subject to observe, that the section under which the proceedings in this case have been instituted gives no preference to any class of creditors; and the only section of the act which prescribes the manner of distributing the effects of an insolvent corporation directs an equal distribution.

I shall therefore decree an equal distribution of the assets among all the creditors of the Franklin Bank, and shall direct the receiver to make the first dividend as soon as he shall be able to divide twenty-five per cent. on the gross amount of the debts.

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A rehearing of a cause is not a matter of course, except in the cases provided for by the rules of the court.

In other cases, a rehearing rests in the discretion of the Chancellor.

Where a decree of one Chancellor is reversed by his successor in office, a rehearing will be granted by a third Chancellor, on cause shown.

If a motion for a rehearing is made for delay, it will be refused.

*THIS was a petition by the complainant for a rehearing, Nov. 14th.

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which stated that the late Chancellor, having been counsel for one of the parties previous to his appointment, the cause was heard before Judge Betts, of the second circuit, sitting for the Chancellor; that a decree was made in favor of the complainant to the whole extent of his claim; that the cause was afterwards reheard before Judge Emott, the successor of Judge Betts, when the decree was reversed as to the principal part of the complainant's claim. The petitioner further stated that he was poor and unable to bear the expense of an appeal to the Court of Errors, and offered to waive his right to appeal if the last decree should be affirmed on a rehearing before the present Chancellor.

G. Griffin, for the complainant:—A cause may be twice, or oftener, reheard before different persons. *Howell v. Howell*, 1 Dickens, 426. *Newcomb v. Bonham*, 1 Vernon, 7, 214. *Bonham v. Newcomb*, 1 Vernon, 282. *Bovey v. Smith*, 1 Vernon, 60, 84, 144. *Porter v. Hubbert*, 2 Ch. Rep. 85; 3 Ch. Rep. 78. *Parker v. Doe*, 2 Chan. Cas. 200. *Noel v. Robinson*, 1 Vernon, 90, 94. *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 581. 3 Ves. 332. 3 Ves. 492. *Blackburn v. Jepson*, 2 Ves. & Beame's R. 358. *Waldo v. Caley*, 16 Ves. 214. *East India Co. v. Boddam*, 13 Ves. 421.) The rule that a cause shall not be twice reheard is not inflexible. It only applies to a case where the same person decides twice alike. The poverty of the complainant is a ground for a rehearing, he having consented not to appeal to the Court of Errors. (2 Ball & Beat. 75.)

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**O. Hoffman* and *J. Duer*, contra:—There cannot be a second rehearing before the same Chancellor. (*Fox v. Mackreth*, 2 Cox's Ch. Cas. 157.) Wherever a rehearing is allowed it must be before the same person. (*East India Company v. Boddam*, 13 Ves. 421.) If the hearing before Judge Betts and Judge Emott, sitting as Chancellor, has not the same effect as if the Chancellor heard both arguments, then the case of the *East India Company v. Boddam*

applies. Special circumstances must always exist to warrant a second rehearing.

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THE CHANCELLOR :—By the ancient practice of the English Court of Chancery, as appears from the cases cited in (*Fox v. Mackreth*, 2 Cox's Cas. 158,) causes were sometimes reheard more than once, on the application of the same party. But it is now settled in that court, that a second rehearing cannot be had at the instance of the same party, after the first decree has been affirmed, except in a case of palpable mistake, or under very special circumstances. (*East India Company v. Boddam*, 13 Ves. 421.) But I have not been able to find any case in the English reports in which a rehearing has been refused on the ground that the cause had already been reheard, if the application came from the opposite party. In England, one rehearing appears to be a matter of course, on the usual certificate of counsel. (18 Ves. 325.) But by the practice of this court it is not a matter of course, except in the special cases provided for in the 70th rule. In all other cases, the granting or refusing a rehearing rests in the sound discretion of the court. The Chancellor may refuse to rehear a cause, where there is reason to suspect it is intended for delay; or may impose such terms upon the applicant as may be necessary to preserve the rights of the other party from injury during a protracted litigation. If a cause has been twice heard on the same point, and the Chancellor on the last hearing has reversed his former decree, it might be deemed unreasonable to ask the same Chancellor to review his last opinion. But if the decree of one Chancellor has been reversed by his successor in office, the first rehearing cannot reasonably be urged by *the party in whose favor it was granted, as an objection to a review by a third Chancellor, of these conflicting decisions of his predecessors. This is substantially such a case. Each of the circuit judges, when hearing this cause, represented the Chancellor in this court. I, therefore, think it a proper case to be

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1828. reheard, and without any restriction upon the right of the complainant to carry the cause to the Court of Errors, if the decision of this court should be against him on such rehearing.

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of the Niagara
Ins. Co.

It is at least doubtful whether this court now possesses the power to direct the cause to be reheard before a circuit judge. If such power existed, it would not be a judicious exercise of it in a case situated as this is, to send the cause back to either of the circuit judges whose conflicting opinions were to be reviewed.

There must be a rehearing before the Chancellor on the usual terms.

IN THE MATTER OF THE NIAGARA INSURANCE COMPANY
OF NEW YORK.

Under the act to provide for the dissolution of incorporated insurance companies in the city of New York, passed April 5, 1817, the Court of Chancery should exercise the same discretionary power in decreeing a dissolution, as the legislature would, in case the latter were applied to by the directors of the company for a repeal of the charter.[1]

The court is not bound to decree a dissolution of the corporation, simply because a majority of the directors and stockholders request it to be done.

But where the owners of a large proportion of the stock find it for their interest to withdraw their capital, it will be deemed presumptive evidence, that the interest of the stockholders generally will be promoted by a dissolution of the corporation.

Nov. 20th.

G. GRIFFIN, on behalf of a majority of the directors and stockholders of the Niagara Insurance Company, moved for a decree to dissolve the corporation, under the Act to provide for the dissolution of incorporated insurance companies in the city of New York, passed April 5th, 1817. He contended that public policy was not one of the grounds put forth in the statute as a cause either for or

[1] See 2 R. S. (4th ed.) 710, sec. 75.

against a dissolution. The *true and the only question was, whether the interest of the stockholders required a dissolution of the corporation or not. There could be no better criterion as to this point, than the opinion of the owners of the stock themselves. The petitioners in this case were all practical men. They represented nine-tenths of the stock. The Chancellor, under this statute, acts as a commissioner. His powers are ministerial only. The 4th section of the act points out the circumstances to be considered by the Chancellor. It declares that he is to have regard to the interest of the stockholders in making his decision.

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B. Robinson & J. Duer, contra:—The petitioners ought to show good reasons for a dissolution of the corporation, independent of the mere will of the majority. To dissolve this corporation would be a dangerous precedent. It would open a door to the commission of frauds upon stockholders. Speculators might obtain the control of the company, contrive to depreciate the stock in the market, then buy it in and apply for a dissolution, and pocket the spoils. The will of the majority ought not to control, if it would lead to positive injustice. The power of this court is limited. It cannot act unless certain facts specified in the statute are made to appear. The legislature did not intend that the will of the majority should be the only thing necessary to a dissolution; if they did, they would not have required any application to the court. The court will not dissolve the corporation, unless it is of opinion that a dissolution is either necessary or would be beneficial to the stockholders. The public are concerned in this question. If the doctrine of the opposing counsel be correct, all the insurance companies might be successively swept away by speculators. The stock does not always command a price in proportion to its actual value.

THE CHANCELLOR:—In this case, it appears that the original amount of capital stock was half a million of dol-

1828. lars, divided into 10,000 shares, of which something more
In the Matter than eleven hundred belonged to the company, and the
of the Niagara rest to individual stockholders. A majority of the direc-
Ins. Co. tors, *and the owners of more than three-fourths of the
stock, apply for a dissolution of the incorporation, on the
ground that it is for the interest of the stockholders. The
owners of about one-ninth of the stock remonstrate against
the dissolution of the company, and some of them swear to
their belief that the business of the company may be made
profitable. The residue of the stockholders have neither
applied for the dissolution, or made any objection thereto.

In deciding upon the propriety of a dissolution, in the
cases provided for in the act under which these proceed-
ings have taken place, this court should exercise its discre-
tionary power, and decree a dissolution, under the same
circumstances which would induce the legislature to repeal
the act of incorporation, on the application of the directors.
The court is not bound to decree a dissolution merely be-
cause a majority of the directors and stockholders request
it to be done. But when the owners of a very large pro-
portion of the stock find it for their interest to vest their
capital in something more productive, it is strong evidence
that the interest of the stockholders generally will be pro-
moted, by allowing them to withdraw their capital and
discontinue the business of insurance. In such a case, the
particular interest of the few must give way to the general
interest of the many. The fact that insurance stock, where
the capital is perfectly sound, is below par in the market,
is of itself strong evidence that the capital of such com-
panies may be employed more profitably, or at least more
safely, in some other business. In this case, the wishes of
this very small minority of stockholders must give way to
the interest of such a large majority, and the corporation
must be dissolved.

There must be a reference to a master to report proper
persons as trustees, and the amount of security to be given
by them for the faithful execution of their trust.

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v.
Kirby.

*KIRBY v. KIRBY.

In a suit brought by either husband or wife for a divorce, on the ground of adultery, the wife prosecutes and defends without a guardian or next friend, as a feme sole;[1] and her affidavit is admissible against the husband, as to any matter or proceeding in the cause.

An injunction, a receiver, and a writ of *ne exeat*,[2] may all be resorted to in the same suit, to aid the court in doing justice between the parties.

A husband, by committing adultery, subjects himself and his property to the jurisdiction of the Court of Chancery, so far as to enable the court to order his property to be applied to the support of his family, both during the litigation and afterwards.[3]

And the power of the court extends to compelling the husband to apply a portion of his daily earnings to the same object, during the pendency of the suit.

THIS was a motion on the part of the defendant to dis- Nov. 20th.
solve the injunction and *ne exeat* issued in this cause; and the complainant applied for the appointment of a receiver, and for a monthly allowance out of the estate of her husband, for the support of herself and children during the litigation. The facts upon which the motions were founded appeared in the opinion of the Chancellor.

D. Selden, for the defendant, cited *Sedgwick v. Watkins*, (8 Brown's Ch. Cas. 12; 1 Ves. jun. 49;) *Mix v. Mix*, (1 John. Ch. R. 108; (*Miller v. Miller*, (6 John. Ch. R. 91.)

E. Paine, contra, cited 1 R. L. 200, sec. 5; *Shafstoe v. Shafstoe*, (7 Ves. R. 170;) 2 Madd. 184; *Barrere v. Barrere*, (4 John. Ch. R. 187;) *Denton v. Denton*, (1 John. Ch. R. 364.)

THE CHANCELLOR:—The complainant has filed a bill for a divorce, on the ground of adultery. There are three

[1] See New York Code, sec. 114; *Shore v. Shore*, 2 Sanf. S. C. R. 715.

[2] *Bushnell v. Bushnell*, 7 How. Prac. R. 393.

[3] 2 R. S. (4th ed.) 329, sec. 57.

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children of the marriage, the eldest of whom is only six years of age. The defendant's property consists of an undivided interest in certain coasting vessels which sail between New York and Baltimore, estimated at from \$500 to \$1,000. The income of this property, including the personal services of the defendant as captain of one of the vessels, amounts to *\$35 per month. On the affidavit of the complainant, and upon the particular circumstances charged in the bill, the master has allowed an injunction to restrain the defendant from parting with his property, and has also allowed a *ne exeat*, in the sum of \$3,000. The defendant applies to dissolve the injunction and *ne exeat*, or to modify the same, and the complainant applies for a receiver, and for a monthly allowance for the support of herself and children pending the litigation.

There is no weight in the objection that the injunction and receiver cannot be allowed on the affidavit of the wife. In these divorce causes, the wife prosecutes and defends without guardian, as a *feme sole*. It has been the uniform practice of the court to receive the affidavit of either party against the other, as to any matter or proceeding in such cases.

The injunction, receiver and *ne exeat*, may all properly be made use of to aid the court in doing justice between the parties. The husband, who is guilty of adultery, voluntarily subjects himself and his property to the jurisdiction of this court, so far as to enable the Chancellor to order his property to be applied to the support of his family during the litigation, and afterwards. The court may also compel him to devote a part of his daily earnings to the same object pending the suit. The injunction and *ne exeat* were properly issued; but, from the facts now appearing, the latter writ required bail in too large an amount. It must be reduced to the sum of \$1,000. The injunction must be continued, and a receiver appointed, with directions to allow to the complainant \$25 per month out of the property, for the support of herself and children pending this litigation.

tion, or until the further order of the court. But to enable the defendant to continue his employment, as master of the vessel between New York and Baltimore, the receiver is not to be appointed, and the injunction and *ne exeat* are to be dissolved, provided the defendant does, within one week, execute and deliver to the assistant register of this court a bond, with two sufficient sureties, to be approved of by a master in the sum of \$1,000, *conditioned to pay the monthly allowance above mentioned, and to obey, perform and abide by such other orders and decrees as may from time to time be made by the court in this suit.

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v.
Pell

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ELLIOTT, EXECUTOR OF ELLIOTT v. PELL AND OTHERS.

A decree can only be questioned by a bill of review.

A decree between co-defendants may be made, grounded upon the pleadings and proofs between the complainants and defendants.

But such decree to be binding, must be founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants.

Where one of two defendants denies in his answer all knowledge of the facts alleged in the complainant's bill, the complainant, in order to give such defendant an opportunity to litigate his rights, must file a replication to his answer.

A decree, made upon bill and answer, cannot affect the rights of any of the parties, as to other matters which were not the subject of litigation in that suit.

Where an instrument in writing was duly executed, conveying certain lands to the grantee, his executors, administrators and assigns, for and during the term of one year, yielding and paying therefor yearly lawful interest of seven per cent. during said term of one year, and in and upon the 14th of November, 1810, with a condition to be void on the payment by the grantor of 600*l.* to the grantee, on the 14th of November, 1810, containing also a covenant on the part of the grantor, to pay the 600*l.* and interest at the time above mentioned, the same was held to be a good and valid mortgage and security in equity, for the sum covenanted in the instrument to be paid by the grantor.

And such instrument would be valid and binding against all persons chargeable with notice of the same.

1828. ON the 14th of November, 1809, Caleb Pell and Martha
 Elliott his wife were the owners of a farm in Westchester county,
 v. containing about 201 acres; and on that day, by an instru-
 Pell. ment in writing, signed, sealed and acknowledged in due
 Dec. 2d. form of law to pass the real estate of a feme covert,
 granted, bargained and sold to E. Pugsley the farm, to
 have and to hold the same to the said E. Pugsley, her ex-
 ecutors, administrators and assigns, for and during the term
 of one year, yielding and paying therefor yearly lawful in-
 terest of seven *per cent. during the said term of one year,
 and in and upon the 14th of November, 1810, next ensu-
 ing, with a condition to be void on the payment by C. Pell
 and wife of £600 to E. Pugsley, on the 14th of November,
 1810, without any deduction or abatement for taxes, assess-
 ments, or any other impositions whatsoever, with a cove-
 nant therein, on the part of C. Pell and wife, to pay the
 £600, and interest thereon, at the time above mentioned.
 On the 14th of November, 1810, C. Pell and wife executed
 two bonds for the £600 and interest, one of which, condi-
 tioned to pay £428 9s. 2d. was given to her daughter, Mary
 Towbridge. E. Pugsley died in December, 1811, having
 made Maria, the wife of Aaron Pell, her executrix.

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Previous to March, 1821, C. Pell and wife mortgaged
 and sold parts of the farm to *bona fide* mortgagees and pur-
 chasers, who had no knowledge of the claim under the in-
 strument given to E. Pugsley. On the 29th of March,
 1821, the executrix of E. Pugsley caused the instrument
 above mentioned to be recorded as a mortgage, and the
 next day thereafter C. Pell and wife conveyed the residue
 of the farm unsold to the defendants, James E. Pell and
 Elijah C. Pell. On the 2d of May, 1821, J. E. and E. C.
 Pell mortgaged twenty-six acres of the farm to Harvey El-
 liott, the complainant's testator, to secure the payment of
 \$800 and interest, and afterwards conveyed the same land,
 with the residue of the farm which remained unsold, to the
 defendant, Betsey Hinman. The defendants, M. Mitchell
 and Ann Aislabie, are subsequent incumbrancers upon the

twenty-six acres mortgaged to Elliott, and upon the residue of the farm which had not been previously conveyed.

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Pell.

In July, 1822, Harvey Elliott filed a bill in this court to foreclose his mortgage on the twenty-six acres, and made the same persons who are now defendants parties to that suit; in which bill he alleged that E. C. and J. E. Pell were seized of the twenty-six acres of land, and mortgaged the same to him; setting out the bond and mortgage and the subsequent conveyance of the twenty-six acres to Betsey Hinman, subject to his mortgage, and the incumbrances of Mitchell and *Aislabie upon the mortgaged premises, and alleging that since the date of his mortgage the defendants, Aaron Pell and wife, gave out and pretend that they hold an instrument in writing, under seal, executed by Caleb Pell and wife to Elizabeth Pugsley, dated in 1809, which amounts to a mortgage on the premises so mortgaged to complainant; but he denies that they hold any deed or instrument for the premises mortgaged to him, except a lease for one year, by way of mortgage, which has long since expired; and if they hold any other mortgage, the same has never been recorded, and has been satisfied and paid off; and the same not being on record, his mortgage must have a preference. And he called upon the defendants to answer whether A. Pell and wife, in their own right or as trustees, held any other instrument in writing which was an incumbrance upon the twenty-six acres other than the lease for one year by way of mortgage, and whether the said lease was not then expired and void; and if they had any other instrument in writing, by way of mortgage, whether the same had not been duly satisfied and paid off; and that they set forth the same particularly, with dates, parties, registry, acknowledgments and consideration, and how much remained due thereon. To that bill A. Pell and wife put in an answer, setting forth the instrument and bonds executed by C. Pell and wife to E. Pugsley, and alleging, in substance, that the instrument, although in its terms a mortgage for only one year, was in-

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Pell.

tended by the parties thereto to be a mortgage in fee simple; and that at the time the two bonds were executed for the principal and interest due upon the said instrument, it was further agreed by C. Pell and wife that the said instrument should remain as a security for the bond which was given to E. Pugsley. The other defendants denied all knowledge of any existing mortgage, judgment, claim or lien upon the premises mortgaged to the complainant, in favor of the representatives of E. Pugsley. To the answer of Pell and wife, a replication was filed, but no proof was taken by either of the parties, the complainant's counsel supposing the answer would not be evidence, and that the burden of proof lay on the defendants.

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*No replications being filed to the answers of the other defendants, no rules were given for them to produce proofs. That cause was brought to a hearing in May term, 1823, and in July thereafter a decree was entered, whereby it was declared that the instrument in writing was a good and valid mortgage and security in equity, for the amount of the bond to E. Pugsley, according to the manifest intent of the parties, and the reasonable interpretation of the said instrument, as against Caleb Pell and Martha his wife, and their heirs and assigns, and as against the other parties to that suit, all of whom were chargeable with notice of the mortgage, by means of the registry thereof, when their respective liens on the mortgaged premises accrued. It was therefore ordered and decreed, that it be referred to a master to compute the amount due thereon to A. Pell and wife, and the amount due to the complainant on his mortgage, and that on the coming in of the report, all the premises mortgaged to the complainant, as described in his bill, be sold, and that out of the proceeds of the sale, the amount due to A. Pell and wife, with their costs of suit, be first paid, and that out of the residue the amount due to the complainant, together with his costs, be next paid, and that the residue remain in court, with liberty to the defendants Mitchell, Aislalie and Hinman, to apply and establish their

claims thereto, as they should be advised. The decree was afterwards affirmed on a rehearing before Chancellor Sanford. After the rehearing, Harvey Elliott died, and in May, 1824, the decree was revived against the complainant in this suit, who is his executor.

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v.
Pell.

In July, 1824, the complainant filed his bill in this cause, setting forth the above facts, and the proceedings and decree in the former suit, and praying that the part of the farm of 201 acres, which had been incumbered since the registry of the mortgage to Harvey Elliott, should be first sold, and applied to satisfy the amount due to A. Pell and wife, with their costs, and that the deficiency only, be paid out of the proceeds of the sale of the 26 acres.

The complainant subsequently amended his bill, suggesting the invalidity of the Pugsley mortgage, and praying leave to take proofs to establish such invalidity, and if the same should be decreed invalid, that then the proceeds of the sale of the 26 acres be first applied to the payment of the Elliott mortgage and costs. To this part of the bill, the defendant A. Pell and wife put in a demurrer, which, on argument before the late Chancellor, in November, 1827, was allowed without prejudice to the relief sought by the bill, in the matters not demurred to, and with leave to the complainant to file a bill of review upon the usual deposit in such cases.

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No bill of review being filed, the defendants A. Pell and wife and Mitchell and Hinman, put in their answers to the bill in this suit as originally drawn; to which answers the complainant filed replications, and proofs were taken on the part of the defendants Mitchell and Hinman, which were read at the hearing, *de bene esse*, subject to the objection of the other parties to the suit.

J. Wallis, for complainant:—All the defendants in the former suit are bound by the decree in that suit. A decree is equally binding between co-defendants as between the

1828. complainant and the defendants. (*Chamley v. Lord Dunsany and others*, 2 Sch. & Lef. 710.) A decree may be made in this suit founded upon the former decree. The complainant has a right to compel A. Pell and wife to resort first to that part of the property included in their mortgage, and which is not covered by the mortgage of the complainant. (*Evertson v. Booth*, 19 John. R. 492.)

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W. Silliman, for the defendants Mitchell and Hinman: The complainant having by his bill in the former suit, and by his replication to the answers of the defendants A. Pell and wife, in that suit, and by his replication to the answers of the defendants in this suit, insisted that the mortgage of A. Pell and wife was invalid, he is precluded from now asserting its validity. 1 Phil. Ev. 245; 2 Jac. L. Dic. 441; 1 Phil. Ev. 242.) No replication having been filed to the answers of Mitchell and Hinman in the former suit, no proofs could be taken by them, and they are therefore not concluded by the decree in that suit. The mortgage of A. Pell and wife is only a mortgage for one year. It is not an equitable mortgage *in fee. The registry of this mortgage is only constructive notice of what appears on its face. The registry of equitable mortgages not being sanctioned by law has no effect as a notice. (Pow. on Mort. 739, 748; 1 John. Ch. R. 273; 1 Brown's Ch. Cas. 98.)

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W. T. McCoun, for A. Pell and wife:—The decree in the former suit as to the validity of the mortgage of A. Pell and wife is binding as well upon the defendants as the complainants. (*Chamley v. Lord Dunsany and others*, 2 Sch. & Lef. 710.)

THE CHANCELLOR:—By the decision of the late Chancellor upon the demurrer in this cause, it is settled that the decree in the former suit, so far as relates to the lien of the Pugsley mortgage upon the twenty-six acres, which was the subject of litigation there, is binding and conclusive, and can

only be impeached by a bill of review. There is certainly no error on the face of that decree which could authorize the complainants to reverse the same. The answer of A. Pell and wife was responsive to the bill, and so far was evidence against the complainant. If the co-defendants in that suit were not bound by that answer, because they had no opportunity to produce evidence to contradict it, they only could sustain a proceeding to reverse the decree for error in law, so far as it affected their rights. But that question cannot be raised except by a direct proceeding to review the original decree.[1.]

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It is the settled law of this court, that a decree between co-defendants, grounded upon the pleadings and proofs between the complainant and the defendants, may be made; and it is the constant practice of the court to do so to prevent multiplicity of suits. *Chamley v. Lord Dunsany and others*, 2 Sch. & Lef. 710, 718. *Conry v. Caulfield*, 2 Ball & Beat. 255.) But such decree between co-defendants, to be binding upon them, must be founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants.[2]

The bill in the original cause sought the foreclosure of a mortgage upon the twenty-six acres only; and the defendants Mitchell, Hinman, Aislabie and A. Pell and wife, were *made parties, on the ground that they claimed to be incumbrancers on that particular piece of land. They were called upon to answer as to any incumbrances they might have upon the twenty-six acres, and no allusion whatever was made to any incumbrances or rights of the defendants, or

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[1] *Woodruff v. Cook*, 2 Edw. Ch. 259; *Bogardus v. Clark*, 4 Paige, 623; Kent, Ch., in *Murray v. Murray*, 5 John. Ch. 60; *Holms v. Remsen*, 7 id. 286; *Gelston v. Hoyt*, 1 id. 543; *Gardner's Adm'r v. Strobe*, 5 Lit. 339; *Burch v. Scott*, 1 Bland, 120; *Sanders' Heirs v. Galewood*, 5 J. J. Marsh. 327; see further Am. Ch. Dig. by Waterman, tit. Decree.

[2] *Hopkins v. Lee*, 6 Wheat. 109; *Bank of United States v. Beverly*, 1 How. U. S. 134; *Washington Bridge Co. v. Stewart*, 3 id. 413; *Crandell v. Gallup*, 12 Conn. 365; *Breckerinridge v. Ormsby*, 1 J. J. Marsh. 236; *Allin v. Hall*, 1 A. K. Marsh. 525.

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Pell.

any of them, to any other land. Neither did the answer of A. Pell and wife set up the Pugsley mortgage as a valid and subsisting lien upon any other land than the twenty-six acres. After setting out the mortgage, and the agreement of C. Pell and wife respecting the same, they charged and insisted, and submitted to the court, that the said mortgage was a valid and subsisting lien or incumbrance upon the premises mortgaged to the complainant, as in his bill was mentioned and set forth; and that they were entitled to a preference and priority of payment out of the said mortgaged premises. The decree made upon that bill and answer must be taken with reference to the matters then in litigation before the court, and cannot be construed to affect the rights of any of the parties as to the other lands which were not the subject matter of litigation in that suit. If A. Pell and wife had actually released all the lands covered by the Pugsley mortgage, except the twenty-six acres, from the lien thereof, the other defendants could not have given such release in evidence in that suit, because no question as to any other lands was in litigation. If the complainant in the first suit had set out all the facts, as his executor now has done, and claimed to throw the Pugsley mortgage, if it should be declared valid, upon the lands of the other defendants, he would then have given them an opportunity to litigate their rights. But even in such a case it is doubtful whether he could have effected that object without filing a replication to their answer, and thus giving them an opportunity to contest the validity of the Pugsley claim.

The prayer of the complainant's bill in this suit, seeks directly to alter, in two very material respects, the decree in the former suit. As no such relief can be granted, the bill must be dismissed. But even if there had been a prayer for substitution, or for relief generally, the defendants Mitchell and *Hinman would have been permitted to show that the Pugsley mortgage was not a valid and subsisting lien upon the lands not affected by the decree in the former suit. And the evidence taken in this cause, and

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admitted on the hearing to be read, *de bene esse*, as I understand it, abundantly establishes the fact. The complainant's bill must therefore be dismissed; but as he has prosecuted this suit as executor, in good faith, he is not to be charged with costs.

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Pritchard
v.
Hicks.

PRITCHARD v. HICKS AND ANOTHER, EXR'S, &C.

Where executors prove the will and a codicil thereto, and undertake the execution of the same, they cannot afterwards object that the codicil was not properly executed.

It is a general rule, that a residuary legatee, or other person prosecuting for a distributive share of the estate, should make all the other persons interested in the distribution, parties to the suit, in order that only one account be taken.

But this is not necessary where a creditor or legatee prosecutes, who is entitled to a priority of payment.

The executor or administrator in such cases is the legal representative of the residuary legatees, and it his duty to protect their rights.

And if there is a fair question for litigation, and he does nothing more than his duty in attending to their interests, he will be allowed his costs out of the fund belonging to them.

Where the subject of the devise or legacy is described by reference to some extrinsic fact, extrinsic evidence may be resorted to, to ascertain that fact. So where the words of a will are equally applicable to two persons or two things, parol evidence is admissible to show what person was the object of the testator's bounty, or which article he intended for the legatee.

THE complainant and Mariena Pritchard were the joint December 2d. owners of a house and lot in Greenwich street, in the city of New York, on which the complainant, with her assent, had given a mortgage to Kinlock Stewart. The complainant also owed to George Shevill on a note about \$100, and to the estate of Colonel William Jones about \$150, on a note given to him before his death. In November, 1826, Mariena Pritchard made her will in writing, by which, after some small pecuniary legacies, she devised and be-

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Hicks.

queathed all the residue of her estate to the infant daughter of her relative William Stewart, of London, and made him, together with *the defendants, her executors. By two subsequent codicils, she disposed of her wardrobe in specific legacies to her friends, and made John Crerar a joint executor with the others. On the 20th of February, 1827, four days before her death, she made a third codicil as follows:

NEW YORK, 20th February, 1827.

"It is my will and pleasure that a certain mortgage, held by the heirs of Kinlock Stewart on my house in Greenwich street, be taken up or lifted with the moneys deposited in certain banks in this city; also all debts now due to Messrs. Shevill and heirs of the late Colonel Jones, say something like \$250, in all \$250.

"MARIENA PRITCHARD. [L. S.]

"WILLIAM THOMPSON.

"ELIZA COLES."

At the time of making this codicil, the only mortgage on her house and lot in Greenwich street, was the one given by the complainant; and the only debts due to Shevill, or the heirs of Jones, were the two notes also given by him as above mentioned. After her death, the defendants, together with Crerar, who is since dead, proved the will and codicil before the surrogate, and took out letters testamentary thereon. The personal estate of the testatrix, which consisted principally of moneys deposited in the different banks of New York, was amply sufficient to pay the above sums, together with her debts and specific legacies. Thompson, one of the executors, was willing to pay off the mortgage, and the two debts mentioned in the last codicil, but Hicks declined doing so, and the funds being in his hands, the complainant filed the bill in this cause to compel the payment thereof. The defendant Thompson, in his answer, admitted the due execution of the codicil, and that he knew

from the declarations of the testatrix at the time she made the same, that the above-mentioned notes and mortgage given by the complainant were what she intended should be paid, and were the only ones which could answer the description in the codicil.

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v.
Hicks.

The defendant Hicks denies all knowledge of the due execution of the codicil, or the intention of the testator, *although he admits the codicil has been registered with the will, and that he, together with the other executors, except Stewart, took out probate thereon. A replication to the answer of Hicks having been filed, proofs were taken in the cause, which fully established every allegation in the bill not admitted by the answer.

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J. Boyd, for the complainant:—The direction of the executrix to pay out of her personal estate specific debts due from the complainant, if it is to be considered in the nature of a legacy, it must be deemed a specific legacy, and consequently must be paid before there can be any residuary estate. It cannot therefore be necessary to make the residuary legatees parties. But the direction contained in the codicil is not a legacy, but an appointment, and as such is obligatory on the executors, if they have assets, over and above all debts and specific legacies. The codicil is a perfect and intelligible instrument in itself; and if any doubt exists as to the subject matter of its application, parol evidence is admissible to remove that doubt. (Roper on Leg. chap. on Construction of Bequests, sec. 6; *Bland v. Bland*, Finch's Ch. Pre. 201, note; *Attorney-General v. Hall*, Fitz. 314; *Wynne v. Hawkins*, 1 Brown's Ch. Cas. 179. Rob. on Wills, 470, ch. 3, pt. 7, Lond. ed. 1809; *Masters v. Masters*, 2 Pr. Wms. 423; *Harris v. Bishop of Lincoln*, 2 Pr. Wms. 435.)

T. H. Flandereau, for the defendant Hicks:—The residuary legatees not having been made parties, no decree can be made; (*Brown v. Ricketts*, 3 John. Ch. R. 553; *Good v.*

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Blewitt, 18 Ves. 399; *Parsons v. Nevill*, 3 Brown's Ch. R. 865; *Cockburn v. Thompson*, 16 Ves. 327.) The codicil cannot be explained by parol proof. At all events, no final decree ought to be pronounced until the parties interested have had an opportunity of contesting these questions.

D. Selden, for the defendant Thompson.

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THE CHANCELLOR:—There is no validity in the objection made by the counsel of Hicks, that the residuary legatees are not parties to this suit. This is not the proper place *to contest the question as to the due execution of the codicil. As it relates to personal property only, if it was not duly executed, the executors should have proved the will without the codicil, and then all persons interested might have been cited before the surrogate to litigate that question, and have their rights settled by the proper tribunal. The defendants having undertaken the execution of the whole will, they cannot now object to the due execution of any part thereof; (*Hume v. Burton*, 1 Ridgw. P. C. 277; *Monell v. Dicky*, 1 John. Ch. R. 153.) It is a general rule, that a residuary legatee, or other person suing for a distributive share of the estate, should make all the other parties interested in the distribution, parties to the suit, so that one account only may be taken. But in this case, no account of the estate is to be taken against the executors, as the fund is admitted to be amply sufficient. A creditor or legatee who is entitled to priority of payment, need not make the parties interested in the residuum of personal estate, parties to the suit; (*Brown v. Ricketts*, 3 John. Ch. Rep. 556; *West v. Randall*, 2 Mason's Rep. 181.) The executor or administrator is, in such cases, the legal representative of the rights of the residuary legatees, and it is his duty to see them properly defended; and if there is a fair question for litigation, and he does nothing more than his duty in attending to their interests, he is always allowed his costs out of the fund belonging to them.

The only question, then, is as to the construction and meaning of the last codicil. And here it is insisted by the counsel for Hicks, that no parol evidence can be received, to explain the intent and meaning of the testatrix.

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Hicks

Where the subject of the devise or legacy is described by reference to some extrinsic fact, extrinsic evidence must be resorted to for the purpose of ascertaining that fact, and thus to ascertain the subject of a testator's bounty.[1] *Sanford v. Raikes*, 1 Meriv. 646.

I do not conceive it necessary to go farther in this case. The testatrix directs the mortgage on her house, and the debts due to Shevill and the heirs of Colonel Jones, to be paid by her executors. The parol proof established the fact, that the mortgage and two notes in question were the only debts *and mortgage existing at the time, which could by any possibility answer the description in the codicil. But the rule as to the admission of parol evidence goes farther. For where the words of a will are equally applicable to two persons or two things, the intention of the donor shall not, for that cause, be defeated; but parol evidence may be received to show which person was the object of his bounty, or which article he intended for the donee.[2]

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The amount due on the mortgage and two notes, together with the costs of this suit, must be paid by the executors out of the assets of the testatrix in their hands.

[1] See 2 Phil. Ev. 297; and Cowen & Hills' Notes, 537.

[2] See Wigram on the Admission of Extrinsic Evidence in aid of the Interpretation of Wills, pp. 11, 14; *Grey v. Shark*, 1 M. & K. 602; per Lord Brougham, Ch., *Miller v. Traverser*, 8 Bing. 244; *Hodges v. Horsfall*, 1 Russ. & My. 116; *Coyt v. Starkweather*, 8 Conn. 289; *Hiscocks v. Hiscocks*, 5 M. & W. 363, 367; *Attorney-General v. Shore*, 11 Sim. 592, 616, 627, 631, 632; *French v. Carhart*, 1 Comst. 96; 2 Cowen & Hill's Notes to Phil. Ev. 537, *et seq.*, where all the authorities in this country and in England on this subject are collected.

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Peckford
v.
Peckford.

PECKFORD v. PECKFORD.

Where a divorce was decreed in a suit brought by the wife against her husband, for adultery, an annuity equal to the annual value of one-third of the husband's property, at six per cent. was allowed to the wife during her natural life, for her alimony.

If her conduct had been discreet, prudent and submissive to her husband, the allowance to her would have been greater.

December 2d. The bill was filed in this cause by the complainant against the defendant, her husband, for a divorce, upon the ground of adultery. A verdict had been rendered in favor of the complainant on the feigned issue awarded to try the fact of adultery. The only question on the hearing was as to the amount of alimony to be allowed to the complainant. It appeared from the proofs that the complainant had been guilty of indiscretions, and had not been a dutiful and submissive wife.

A. L. McDonald for complainant.

R. Bogardus for the defendant.

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THE CHANCELLOR:—The fact of adultery having been ascertained by the verdict on the feigned issue, the only question is as to the amount of alimony to be allowed. The usual course in such cases is to order a reference to ascertain, by the report of a master, the value of the defendant's *property and what would be a suitable allowance. But as both parties have requested the court to settle the allowance to the wife from the fact now before it, I shall save the defendant the expense of a reference. I shall adopt his own estimate of the value of his property, \$12,000, as proved by Joseph Gregory. As the defendant cannot marry again during the life of the complainant, and, therefore, will not want property for the support of a

family, if the wife had been perfectly discreet, prudent and submissive to her husband, I should have allowed her half of this property.

Although there is no pretence for the charge made against her by the defendant, yet by going to England against his wishes, she exposed him to temptation, which has probably proved the destruction of their connubial happiness. Her indiscretions, too, after her return, were such at least as to produce remarks from her more discreet neighbors. Under these circumstances, she must be content to receive for her support for life an annuity equal to the value of one-third of his property, at six per cent. The amount already paid by the husband will probably cover her expenses and counsel fees over and above the taxable costs. There must be a decree for a divorce, and the husband must pay to the complainant's solicitor the taxable costs, and must pay to her an annuity of four hundred dollars during her natural life, commencing on the 1st day of December, 1828, payable quarterly, and to be secured to her satisfaction. And if the parties cannot agree upon the manner in which the same is to be secured, it must be referred to a master to settle the manner in which the same is to be secured, and the place of payment, &c.

1828.

 Palmer
v.
Palmer.

*PALMER v. PALMER.

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The Court of Chancery has no power to decree an absolute or a partial dissolution of the marriage contract, even with the consent of the parties, except in the special cases provided for by statute.

Neither the act of 1813, concerning divorces, (2 R. L. 200,) nor the act of April, 1824, (6 vol. *Laws of New York*,) confers upon the Court of Chancery power to grant a divorce, *a mensa et thoro*, unless the charges contained in the complainant's bill are satisfactorily established.

The usual course, where the bill is taken as confessed, is to order a reference to a master to report as to the facts.

1828.

Palmer
v.
Palmer.

If the bill is filed by the husband for a divorce, *a mensa et thoro*, and he obtains a decree, the wife will not be entitled to a maintenance out of his property.

Where the husband filed a bill against his wife for a divorce, *a mensa et thoro*, and the wife in her answer denied every allegation of improper conduct charged in the complainant's bill, and also set up cruel and inhuman conduct on the part of her husband towards her, and in consequence thereof consented to a decree of separation from bed and board forever, in which a suitable provision should be made for herself and children, the court refused to decree a divorce from bed and board.

December 2d.

THE complainant filed a bill against his wife, complaining of cruel and inhuman treatment, &c., and praying a divorce, *a mensa et thoro*. The defendant put in her answer, in which she fully denied every allegation of improper conduct in the complainant's bill, and also set up on her part cruel and inhuman conduct on the part of her husband towards her, which rendered it unsafe and improper for her to cohabit with him, or to be under his dominion or control; and in consequence thereof she consented to a decree of separation from bed and board forever, in which a suitable provision should be made for the support of herself and her children. The cause was submitted to the court on bill and answer, and a written statement, signed by the solicitors for both parties, requesting a decree of separation, and consenting to an order of reference to a master to inquire and report which of the parties ought to have the care and custody of the children, and the amount of an allowance to be made for the support of the wife and children, or either of them, and the manner of payment thereof.

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*J. Greenwood, for the complainant.

W. T. McCoun, for the defendant.

THE CHANCELLOR:—This court has not power, even with the consent of the parties, to decree an absolute or partial dissolution of the marriage contract, except in the

special cases provided for by statute. By the act of 1813 concerning divorces, (2 R. L. 200,) this court may, on a bill filed by the wife, decree a divorce from bed and board, if it shall appear from the answer and confession of the defendant, or by the bill being taken *pro confesso* against him, or by proof taken in the cause in the usual manner, that the defendant has been guilty of such cruel and inhuman treatment of the wife, or such conduct towards her as to render it unsafe and improper for her to cohabit with him, and be under his dominion and control. By the act of April, 1824, (6 Laws of N. Y. 249,) this court is authorized to extend to husbands the same rights that are given to femes covert by the act of 1814, and to grant to a husband the same relief, and for like causes, as femes covert are entitled to under that act. But in neither case can this court grant a divorce, unless the charges contained in the complainant's bill are satisfactorily established. It would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it. Divorces should never be allowed, except for the protection of the innocent party, and for the punishment of the guilty. In *Barry v. Barry*, (1 Hopk. 118,) Chancellor Sanford decided that a decree for a divorce, *a mensa et thoro*, could not be made upon the admission of the party by suffering the bill to be taken *pro confesso* against him; but that the real facts must in such cases be ascertained by the report of a master. If the bill is filed by the husband, and he makes out such a case as to entitle himself to a decree, the wife will have no claim upon his property for her support. He will be released from the obligation of supporting her, and she will be turned off penniless upon community, unless she has separate property for her maintenance. The statute has *given to this court no authority, in such a case, to provide for her support out of the husband's property. It must, therefore, be a very strong case which will induce this court to grant a final separation on the application of the husband.

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v.
Palmer.

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1828. In the case before me, every allegation of misconduct on the part of the wife is fully denied by her answer. On the other hand, she sets up such conduct on the part of the complainant as does, in fact, render it unsafe and improper that she should live with him, or be under his dominion or control.[1] But I cannot grant her any relief in this suit. If an amicable adjustment of these family difficulties cannot be made between the parties, she must file a bill to obtain a suitable provision for the support of herself and children. The complainant's bill in this case must be dismissed with costs.

Phoenix Ins.
Co.
v.
Gurnee.

THE PHOENIX FIRE INSURANCE COMPANY, APPELLANTS,
v. GURNEE, RESPONDENT.

A court of chancery has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments.

The evidence of the mistake in all cases should be clear and satisfactory.

December 2d. THIS was an appeal from the equity court of the first circuit. The complainant applied to the clerk of the defendants, for an insurance on his grist mill in Haverstraw, and the clerk took down a memorandum of the insurance required, which was signed by the complainant and left with the defendants, in the words and figures following; "On a two story and a half frame grist mill, situate in the town of Haverstraw, on Minisicongo Creek, in Rockland county, one run of stones, 2 bolts, 1 spare runner, with privilege to use a stove in second story. Cost \$1,750, insure \$1,200. New York, 22d Sept. 1825.

DANIEL GURNEE."

[1] The cruelty must be such as endangers life or health, and renders cohabitation unsafe. *Perry v. Perry*, 2 Paige, 501; S. C., 1 Barb. Ch. 516. See also *Blowers v. Sturtevant*, 4 Denio, 47; *Whispell v. Whispell*, 4 Barb. 217, 2 R. S. (4th ed.) 329, sec. 51.

The policy was made out and delivered to the complainant; but instead of conforming to the memorandum, the subject of the insurance was therein described thus: "On his frame mill-house, two and a half stories high, situate in the town *of Haverstraw, on Miniscongo Creek, Rockland county, privileged as a grist mill only." The mill was afterwards burned, and the defendants insist that the policy was on the mill-house only, and not on the mill or machinery. The complainant applied to them to correct the policy agreeably to the written memorandum, which they refused to do; whereupon the complainant filled his bill to correct the mistake. The cause was heard on bill and answer, and the circuit judge decreed that the policy should be corrected agreeably to the written memorandum, with costs.

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Phoenix Ins.
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J. L. Graham for appellants.

J. Anthon for respondent.

THE CHANCELLOR:—It is well settled that a court of equity has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments. (Phil. on Ins. 14.) But the evidence of such mistake, and that both parties understood the contract in the manner in which it is sought to be reformed, should be clear and satisfactory. In policies of insurance, the label or written memorandum from which the policy was filled up, is always considered of great importance in determining the nature of the risk, and the intention of the parties. Thus, in *Motteaux v. The London Insurance Company*, (1 Atk. 547,) Lord Hardwicke held that a policy ought to be rectified agreeably to the label; and in the issues which he directed in that case, the label was treated as the real contract between the parties. In this case, there is a substantial difference between the policy and the written memorandum on which it was founded. The one is an insurance

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v.

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upon a grist mill, and the other is only upon the mill-house, or the mere covering of the substantial parts of the mill. It is to be presumed that insurers are acquainted with the nature of the property which they undertake to insure. If so, the defendants must have known that no owner of a grist mill would ever think of insuring the mill house only, leaving all the substantial parts of the mill exposed to certain destruction, if the mill-house or covering was destroyed. The difference of the description from the *written memorandum must, therefore, have been clearly a mistake of the clerk in filling up the policy, or an intentional fraud upon the insured; and the latter is certainly not to be presumed.

Although the complainant read over the policy before he left the office, it is hardly to be presumed that a plain countryman, unacquainted with the law of insurance, would have noticed or understood the difference which was produced by the change of phraseology in the policy from the plain and intelligible language of the memorandum, which was probably taken down from the lips of the assured.

I think the decree of the circuit court was correct, and the same must be affirmed with costs.

ELLS v. TOUSLEY.

Where certain lands, belonging to E., were sold under a loan office mortgage, and W., by request, bid off the same for E., E. being absent: E., a few days after the sale, refunded the money to W. At the time of the sale, T., one of the commissioners of loans, held a judgment against W.; T., together with his co-commissioner, in June, 1819, executed a deed to W.: in March, 1819, T. issued an execution against W., and in August, 1824, caused the mortgaged premises to be sold under judgment, and bid in the same himself. In September, 1819, W. executed to E. a release of all his interest in the premises; and it was agreed between them that no deed

should be executed to W. by the commissioners. T. purchased in the premises under his judgment, with a full knowledge of E.'s rights. Held that the purchase by T. could not be sustained, and that he could not retain the lien of his judgment upon the premises.

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*Elli
v.
Tousley.*

Under these circumstances, if the deed had been executed by the commissioners at the time of the sale, the title would have been in E. as a resulting trust, and W. could only have held the deed as a security by way of mortgage for the money advanced by him.

The lien of a judgment does not in equity attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person.[1]

And if a purchaser under the judgment has notice of the equitable title before his purchase and the actual payment of the money, he cannot protect himself as a *bona fide* purchaser.

In August, 1808, E. Boylston, being the owner of 16 December 2d. acres of land in Manlius, mortgaged the same to the commissioners for loaning moneys in the county of Onondaga. He afterwards *conveyed the land in fee to T. Dimick, who, on the 28th of April, 1818, conveyed the same to the complainant in fee with warranty. The defendant was one of the commissioners of loans; and in September, 1818, in conjunction with the other commissioner, sold the premises at auction, upon the mortgage, and the same were bid in by J. O. Wattles, for the sum of \$200. In June, 1819, a deed to Wattles, in pursuance of the sale, and bearing date the 16th of September, 1818, was executed and acknowledged by the commissioners, and has since been put upon record. At the time of the loan office sale, the defendant had a large judgment against Wattles, on which he issued execution in March, 1820, and in August, 1824, he caused the 16 acres to be sold on the execution, and bid in the same. In August, 1825, the complainant filed his bill in

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[1] Per Savage, Ch. J. in *Jackson v. Parker*, 9 Cow. 81; *Talbot v. Chamberlain*, 3 Paige, 219; *Grosvenor v. Allen*, 9 Id. 74; *Kellogg v. Kellogg*, 6 Barb. S. C. R. 117; see also 2 R. S. (4th ed.) 153, sec. 4.

The only remedy of the creditor to reach the interest of the debtor in a contract for the purchase of land, is by filing a bill in equity, after he has exhausted his remedy at law for the recovery of the debt, by the return of an execution unsatisfied. *Grosvenor v. Allen*, 9 Paige, 74; *Beck v. Burdett*, Post, 305.

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this cause, setting forth the above facts; and also alleging that at the time of the loan office sale he was absent, and that Wattles, at the request of Dimick, advanced the money, and bid in the lot for the complainant; and that within a few days after the sale, the money was refunded by the complainant to Wattles, together with the sum of \$5, which was received in full satisfaction of the money advanced by him on the bid. That in September, 1819, Wattles executed to the complainants a release, under seal, of all his interest in the lot, acquired by such sale. The bill further alleged that the deed was never in fact delivered to Wattles, but was fraudulently executed and put upon record by the defendant, for the purpose of making his judgment against Wattles a lien upon the land; and that the defendant purchased in the property, at the sheriff's sale, with a full knowledge of the complainant's rights, and threatens, after the time of redemption expires, to take a deed from the sheriff in pursuance of such sale. The defendant, in his answer, admitted the original title to the land in the complainant, as stated in the bill. He admitted that Wattles bid off the land, but denied that it was purchased for the benefit of the complainant, and alleged that he had been informed and believed Wattles bid off the property for his own benefit. He admitted that Dimick and the complainant informed him that Wattles bid off the land for *the complainant, but insisted that Wattles told him differently, and that he gave no credit to what Dimick and the complainant said. And the defendant insisted that if any such agreement was made with Wattles, it was void by the statute of frauds.

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A replication to the answer having been filed, testimony was taken, and the cause was submitted to the court upon the pleadings and proofs.

John Watson, for complainant, cited *Roberts on Frauds*, 100; *Seere v. Seere*, (5 John. Ch. Rep. 12;) *Gale v. Nixon*, (6 Cowen, 448;) *Jackson v. Moore*, (6 Cowen, 725, 726, 2

Fonb. 36 and note;) *Pushmon v. Filliter*, (3 Ves. jun. 9;) *Fisher v. Fields*, (10 John. R. 495;) *Ambrose v. Ambrose*, (1 Pr. Wms. 321;) *Neilson v. Blight*, (1 John. Cas. 205;) *Botsford v. Burr*, (2 John. Ch. R. 410;) *Jackson v. Graham*, (3 Caines' R. 188;) *Jackson v. Town*, (4 Cowen R. 602;) *Jackson v. Chapin*, (5 Cowen R. 485.)

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N. P. Randall, for defendant, cited *Philips v. Thompson*, (1 John. Ch. R. 140;) 1 Phil. Ev. 190, 3; *Steere v. Steere*, (5 John. Ch. R. 1;) 1 Phil. Ev. 131; *Underhill v. Van Cortland*, (2 John. Ch. R. 354, 5;) *James v. McKernon*, (6 John. R. 543;) *Clarke v. Turton*, (11 Ves. 240;) Coop. Eq. Pl. 7; 1 R. L. 75, sec. 12; *Movan and wife v. Hays*, (1 John. Ch. R. 340;) *King v. Boston*, (4 East. 577, note b;) *Botsford v. Burr*, (2 John. Ch. R. 405;) *Lloyd v. Spillet*, (2 Atk. 150;) *Willis v. Willis*, (2 Atk. 71;) *Jackson v. Voorhees*, (9 John. R. 129;) *Sherill v. Crosby*, (14 John. R. 358;) *Denning v. Smith*, (3 John. Ch. R. 333;) *Verplank v. Sterry*, (12 John. R. 536;) *Goodrich v. Walker*, (1 John. Cas. 250;) *Jackson v. Schoonmaker*, (2 John. R. 230;) *Shelton's case*, Cro. Eliz. 7; Jac. Law Dic. tit. *Deed* 2, sec. 7.

THE CHANCELLOR:—From the testimony in this case, it is fully established that the property was bid in for the benefit of the complainant, on the loan office sale. Wattles testifies that he did not purchase the property for his own use; that he purchased it at the solicitation and request of Dimick, in trust for the sole benefit of the complainant; and upon the assurance that he would refund the money in a few days, together with a compensation for his trouble in attending the sale. The amount bid was \$200, but the amount paid was only \$60 or \$70, the residue being for the surplus moneys, for which a release was procured from the mortgagor. A short time after the sale, the money was refunded to Wattles by the complainant, and it was then agreed that no deed should be executed by the commissioners in pursuance of such sale. Dimick corroborates this

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Tousley.

statement, and also testifies, that shortly after the sale he told the defendant that Wattles bid off the land for the complainant, who had refunded the money to him since the sale. Munro, the other commissioner, also testifies, that after the sale commenced, Dimick requested it to be stayed a short time, until he could procure some person to bid; and shortly afterwards Wattles came in and bid off the property, and informed him at the time he paid the money on such bid, that he bid in the land as the agent of the complainant, and had no other interest in the purchase. Under these circumstances, if the deed had been executed by the commissioners at the time of sale, the title would have been in the complainant, as a resulting trust, and Wattles could only hold the deed as a security by way of mortgage for the money advanced by him. (*Boyd v. McLean*, 1 John. Ch. Rep. 582.) It is not material to inquire in this case, whether the defendant, at the time he executed the deed to Wattles, and put it on record, for the purpose of making his judgment a lien upon the land, had a full knowledge of the complainant's rights. From what took place at the sale, he had sufficient to put him on inquiry, independent of the direct information that he received from Dimick of the repayment of the money.

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If, therefore, he made an agreement to discharge other lands of Wattles from the lien of his judgment, and substitute a lien on the 16 acres in lieu thereof, it was a fraud upon the complainant's rights. But his judgment never could in equity, be a lien on this lot. The lien could not attach until the legal title was vested in Wattles by the execution of the deed by the commissioners. And long before any such conveyance was made, the equitable title to the land, at least, *was vested in the complainant, by the repayment of the money advanced, and by the agreement that no deed should be executed. I have lately had occasion to decide, that the lien of a judgment does not, in equity, attach upon the mere legal title to land in the defendant, when the equitable title is in a third person. And

if a purchaser under the judgment has notice of the equitable title at any time before his purchase, and the actual payment of the money at the sheriff's sale, he cannot protect himself as a *bona fide* purchaser.[1]

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Western Ins.
Company
v.
Eagle Fire Ins.
Company.

The sale of the complainant's lands under the judgment, and the purchase by the defendant, after being informed of all the circumstances of the case, cannot be sustained. And the defendant must be perpetually enjoined from taking a deed from the sheriff in pursuance of such sale. He must also release and quit claim to the complainant, all right, title and interest to the sixteen acre lot, and discharge the same from the lien of his judgment, by a proper conveyance or release, to be settled by a master; and he must also pay to the complainant his costs in this suit to be taxed.

THE WESTERN INSURANCE COMPANY OF THE VILLAGE
OF BUFFALO AND ANOTHER v. THE EAGLE FIRE IN-
SURANCE COMPANY OF NEW YORK AND OTHERS.

Where three kinds of relief are prayed for in the bill, and the complainant is entitled to one of them, the defendant cannot demur.

On a bill of foreclosure by a subsequent mortgagee, he will be entitled to redeem the prior mortgage, and then to sell the whole estate for the money due on both mortgages.

If the prior mortgage should not be due, the junior mortgagee will be entitled to a decree for the sale of the mortgaged premises, subject to such prior mortgage.

The complainants, as mortgagees of certain premises in the city of New York, filed their bill in this cause against December 2d.

[1] Actual possession under an unregistered deed is constructive notice to such a purchaser, and imposes on him the duty of inquiring as to the rights of the person in possession. *Tuttle v. Jackson*, 6 Wen. 313; see also *Jackson v. Post*, 15 id. 588; *Hooker v. Pierce*, 2 Hill, 650; *Schutt v. Large*, 6 Barb. 373; *Embury v. Conner*, 2 Sanf. S. C. R. 99. But an equitable lien to secure a prior indebtedness, is not entitled to preference over a judgment lien, where both attach on the land at the same time. *Dwight v. Newell*, 3 Const. 185.

1828. the mortgagor and several junior incumbrancers, and also
 Western Ins. against the Eagle Fire Company of New York, as prior
 Company mortgagees of the same premises. The bill alleged that a
 v. part of the prior mortgages had been paid, and prayed a
 Eagle Fire In. discovery and *reference to a master to ascertain the
 Company. amount due; and that the mortgaged premises might be
 sold, subject to the incumbrance of the prior mortgages, or
 the amount due thereon, as thus ascertained; or that the
 complainants might be permitted to redeem the prior mort-
 gages; or that the whole interest in the mortgaged prem-
 ises might be sold, and the amount due to the complainants
 paid out of the proceeds of such sale, after first satisfying
 the prior mortgages; and for general relief. The Eagle
 Fire Company answered as to all the facts set forth in the
 bill, but demurred to so much of the relief prayed for, as
 sought to obtain an order or decree for the sale of the prem-
 ises covered by the prior mortgages; and they assigned for
 cause of demurrer, that the complainants were not entitled
 to such order or decree of sale, inasmuch as the same would
 give them, in the capacity of subsequent mortgagees, an
 undue control over the prior securities of those defendants.

D. Selden, for complainants, cited *Mondey v. Mondey*, (1 Ves. & Bea. 223;) *Haines v. Beach*, (3 John. Ch. R. 465;) *Ensworth v. Lambert*, (4 John. Ch. R. 605;) *Barker v. Dacie*, (6 Ves. 686;) Mitf. Pl. 172.

S. Boyd, for defendants, cited *Titus, adm'r v. Viele*, (6 John. Ch. R. 435;) *Wotten and wife v. Copeland and others*, (7 John. Ch. R. 140.)

THE CHANCELLOR:—Whether this court can decree a sale of the mortgaged premises without the consent of these defendants, for the purpose of satisfying all the incumbrances out of the proceeds of such sale, according to their order of priority, is a question not properly presented by the demurrer. The proper object of a demurrer is to pre-

vent the necessity of a discovery, or to save the expense of a protracted litigation, by settling the rights of the parties upon some dry point of law, plainly arising upon the case made by the bill. (*Brooke v. Hewett*, 3 Ves. jun. 253.) Where the complainant makes a specific claim to particular relief, which he cannot under any circumstances be entitled to at the *hearing, perhaps the defendant may object thereto by way of demurrer, although there is also a prayer for general or other proper relief in the bill. If such a demurrer be allowable in any case, it ought not to be encouraged, as the defendant may avail himself of the objection at the hearing, with every possible advantage which he could obtain by a demurrer. And the court ought not thus to be called on preliminarily to examine the case in all its bearings, for the purpose of determining what relief the complainant may be entitled to at the hearing, when all the facts and circumstances are fully developed.

In this case, the relief demurred to is not specifically claimed by the bill. The prayer for relief is in a double alternative; and if the complainants are entitled to either of the three kinds of relief thus asked for, the defendants cannot demur, but may, at the hearing, insist that the complainants be confined to such relief only as they may be entitled to under all the circumstances of the case as then presented.

The usual decree in cases of this kind in England, where strict foreclosures are still in use, is that the complainants be permitted to redeem the prior incumbrances, and that the junior incumbrancers redeem in course or be foreclosed. By our practice, sales are substituted for strict foreclosures; and if the complainants are not entitled to a decree to sell the whole estate, and pay the prior incumbrancers out of the same, they are at least entitled to redeem, and then sell the whole estate for the purpose of obtaining the redemption money, as well as to satisfy their own incumbrances. And if the prior mortgagees will not consent to a sale, or the amount of their incumbrances is not yet due, I do not,

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at present, perceive any valid objection to a decree for a sale of the equity of redemption subject to their mortgages, leaving the purchaser to pay the same as they become due, or whenever the prior mortgagees think proper to enforce their lien upon the premises.

This demurrer to one of the three alternatives in the complainants' prayer for relief is therefore improperly taken, and must be overruled with costs.

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MITCHELL AND NASH v. SMITH.

A bill of discovery will be sustained to aid the prosecution or defence of a civil suit in a foreign tribunal.

December 2d.

In this suit, a bill of discovery was filed to aid the defence to an action at law brought against the complainants in the Superior Court of Fairfield County, in the state of Connecticut, at the suit of the defendant Smith, who is a resident of this state. To this bill, the defendant interposed a plea to the jurisdiction of the court; alleging that by the laws of Connecticut, the Superior Court, on a bill in equity brought and presented there, can compel and enforce from a plaintiff in a suit at law a discovery and foreclosure, on oath, of the matters charged in such bill, to be used as evidence in the suit at law.

W. Silliman, for complainants, cited 1 Fowler's Exch. Pr. 395; *Asgill v. Dawson*, (1 Bunb. R. 70;) 1 Brown's C. C. 418; *Wood v. Strickland*, (2 Ves. & Beam. 150; Beame's Pleas in Eq. 91; 2 Madd. Pr. 240; *Ward v. Anedondos*, (1 Hopk. R. 223;) *Arglasse v. Muschamp*, (1 Vern. 75;) Beame's Pleas, 97;) 1 Chit. Pl. 443, and note to Am. Ed.; *Bishop of London v. Fylche*, (1 Brown's C. C. 98;) *Kennedy v. Cussillis*, (2 Swan's 330; 1 Madd. R. 161; *Dunn v. Coates*, (1 Atk. 288;) *Anonymous*, (2 Ves. sen. 451;) *Street*

v. *Ridgley*, (6 Ves. 821;) *Brandon v. Sands*, (2 Ves. jun. 514;) Beame's Pleas, 148.

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J. R. Scott, for defendant, cited 1 Madd. Ch. Pr. 161, 171; Coop. Pl. 191; Beame's Pleas in Eq. 259, 260; Swift's Dig. Cont. 208; *Dunn v. Coates*, (1 Atk. 289;) *Earl of Derby v. Duke of Athol*, (1 Ves. sen. 205;) Anonymous, (2 Ves. sen. 451;) Beame's Pleas, 335; *Cunningham v. Wegg*, (2 Brown's C. C. 241;) Statutes of Connecticut, 138, sec. 10; id. 195, sec. 1; Beame's Pleas, 323, 324.

THE CHANCELLOR :—The different elementary writers on the jurisdiction of the Court of Chancery lay it down as an *established principle, that this court will sustain a bill of discovery to aid the prosecution or defence of a civil suit in a foreign tribunal. (Coop. Pl. 191; Mitford's Pl. 150; 1 Madd. Ch. 196.) And the case of *Crow and others v. Del Rio & Vellego*, [1] decided by the English Court of Chancery in 1769, is

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[1] The learned Chancellor is not supported in this opinion by recent English cases. The Court of Chancery in that country have of late shown a strong disinclination to sustain a bill of discovery to aid a prosecution or defence in a foreign tribunal. In *Bent v. Young*, 9 Sim. 161; Shadwell, V. C., is reported to have said, "In the case of the *Earl of Derby v. Duke of Athol*, Lord Hardwicke seems to think it clear that this court will not compel discovery in favor of an inferior court, or a court which has power, in itself, to compel a discovery. Those two propositions are plainly deducible from the language which his Lordship uses towards the conclusion of his judgment; and I consider that, in the contemplation of the Court of Chancery, every foreign court is an inferior court.

"In the case of *Crowe v. Del Rio*, (which is the only authority on the point now before me), the defendants were compelled to answer by the overruling of the demurrer; and it seems to me that, without entering into the merits of the case, the demurrer was defective in point of mere form, and therefore, it might have been overruled on that ground. In that case two grounds of demurrer were assigned. One was the general want of equity; but, as the bill was not filed for relief but for discovery only, that could be no objection. The other ground was that the defendants were not parties in the foreign court. That, therefore, was a speaking demurrer, for there was no allegation on the face of the bill, that they were parties to the suit, and, the Lord Chancellor may, very probably, have overruled the demurrer on that ground, without at all entering into the consideration of the question, whether this court will enforce discovery in aid of proceedings in a foreign court.

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cited by those writers as establishing that principle. This jurisdiction, which is merely ancillary to the courts of other states, is entirely different from that which would interfere with their proceedings by injunction. If the party wishes to stay the proceedings at law until he can obtain a discovery, he must apply to the tribunal of the state or country where the action at law is pending.

The plea in this case appears to be founded upon the principle, that this court will not sustain a bill of discovery in aid of the jurisdiction of another court, if such court has power to compel the discovery required. But that principle is misapplied here. The case of *Dunn v. Coates*, (1 Atk. 288,) cited in support of this principle, was a bill seeking a discovery in aid of the jurisdiction of the Ecclesiastical Court; and the discovery was refused, on the ground that those courts were capable of coming at the discovery themselves. By the ordinary course of proceedings in those courts, a party may set forth the facts on which he relies, or which he seeks to establish, in the form of an allegation, which the other party may be compelled to answer personally, on oath. Such discovery is not only made in the same court, but in the same suit or proceeding. A bill of discovery in such a case would be worse than useless. The power of the superior courts in Connecticut to compel a discovery is of a very different description. It sufficiently appears from the defendant's plea, and such is undoubtedly the fact, that those courts have two distinct and independent jurisdictions, one of law, and the other in equity, like the Exchequer in England, or the federal courts of our own country. For the purposes of discovery, therefore, the law and equity sides of the Superior Court of Fairfield County are as distinct as if those powers were separately vested in different judges. If that court has the power to compel a discovery from the defendant, who is a resident of this state, it cannot be done by any proceeding in the *suit instituted there on the common law side of the court, but must be by a bill in Chancery. Whether the equity

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powers of that court are sufficiently extensive to reach this particular case of compelling a discovery from a non-resident party, does not distinctly appear from the averments in the defendant's plea. The same must, therefore, be overruled with costs; and the defendant must answer the complainant's bill within thirty days.

1828.

Aikin
v.
Satterlee.

AIKIN AND TEN EYCK v. SATTERLEE AND SATTERLEE.

A party cannot set off a judgment, unless he is the beneficial, as well as the nominal owner of it.

Where A. indemnified T., a sheriff, against selling S.'s goods, for which S. recovered a judgment against T.; held, that A. and T. could not set off against S. a judgment which A. had purchased for less than one-third of its amount, and taken an assignment of it in the sheriff's name.

December 2d.

AIKIN, having obtained judgment against Southwick, Ten Eyck, sheriff of Albany County, being indemnified by Aikin, levied on the property of the defendants, and sold it as the property of Southwick, under a *fi. fa.* in favor of Aikin. The defendants sued Ten Eyck in the Supreme Court for the trespass, and recovered, in October, 1827, \$500. In the October term of that court, in the year 1826, Turner obtained judgment against the defendants for \$618 99; which, in September, 1827, Aikin purchased for \$175, and took an assignment to Ten Eyck, in his (Ten Eyck's) name. The defendants in their answer offered to deduct the amount actually paid by Aikin from their judgment against Ten Eyck, provided the judgment so assigned to Aikin was satisfied and discharged thereby. The defendants moved, upon bill and answer, to dissolve the injunction issued to restrain their proceeding at law to collect their judgment against Ten Eyck.

J. Edwards, for the complainant:—Where a judgment can be enforced against a party, such party may set off

1828. against it a judgment which he has recovered in his own
 Aikin name, or acquired by assignment. (*Simpson v. Hart*, 14
 v. John. R. 63, 3d *vol. Amer. Dig. 451.) The right to set off
 Satterlee. judgments against each other does not depend upon the
 statute of set-offs, but upon the general jurisdiction of the
 court over its suitors. (*Mitchell v. Oldfield*, 4 T. R. 123; 2
 Str. R. 891.) In *O'Conner v. Murphy*, (1 H. Black. R.
 659,) the court allowed a person to off set a judgment in
 which he had only the beneficial interest, and was not a
 party on the record. (Montague, 11; 2 H. Black. 587.)

L. H. Palmer, for the defendants:—The Supreme Court
 have decided this question, and disallowed the set-off. No
 new equity is set up here. (*Satterlee v. Ten Eyck*, 7 Cowen,
 480.) The complainant Ten Eyck, having no beneficial in-
 terest in the judgment of Turner, is not entitled to the set-
 off. (*Tuttle v. Beebe*, 8 John. R. 152; *Fair v. McIver*, 16
 East, 131.) To allow the set-off in this case would be an
 injury and fraud upon the creditors of the defendants. (1
 John. Cas. 51; 2 Caines. Cas. in Err. 303; 19 John. R.
 823; 20 John. R. 137.) It would also be against public
 policy. (*Earl of Chesterfield v. Jansen*, 1 Atk. 352; 2 Ves.
 sen. 156.)

THE CHANCELLOR:—This is the same case which was be-
 fore the Supreme Court on an application for a set-off, in
 October term, 1827.[1] (7 Cowen, 480.) The same ques-
 tion is now presented to this court, with the additional fact,
 that Aikin purchased the judgment, which he seeks to set
 off against these defendants, for less than one-third of its
 nominal amount. And the defendants, in their answer, say
 they have offered, and are still willing to deduct the
 amount actually paid by Aikin for the same, from their re-
 covery against the sheriff, provided the judgment so as-
 signed to Aikin is satisfied and discharged thereby.

This court can never permit a person to say, I am the
 real defendant, in a judgment founded in tort, because I em-

[1] *Mason v. Knowlson*, 1 Hill N. Y. R. 218.

ployed the nominal defendant to trespass upon the rights of the plaintiff and indemnified him for so doing. The whole merits of this case were fully before the Supreme Court, and although their decision may not be deemed technically binding and conclusive here, yet I can see no reason to dissent *from the opinion there expressed. The defendants have offered to do what was equitable, and probably more than they could have been legally required to do. The injunction must therefore be dissolved.

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Connolly
v.
Pardon.

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CONNOLLY v. PARDON AND OTHERS.

Where a testator made a bequest to a person by a wrong Christian name, parol evidence was admitted to show what person was intended.

THIS was a bill for a distributive share of the estate of the late Bishop Connolly. The testator made his will, on the 4th of February, 1825, and after several specific legacies, he bequeathed the residue as follows: "Thirdly, I bequeath to my brother Cormac Connolly, and to my two sisters, Mary and Ann, whatever remains of my money, after the above bequests, to be divided between them share and share alike; and in case of the demise of either of them, to go share and share alike to the survivor or survivors." On the following day, he made a codicil to the will, and thereby, among other things, bequeathed as follows: "To my nephew Cormac Connolly, the son of my brother Cormac Connolly, the sum of five hundred dollars for his ecclesiastical education, which sum is to be taken from what I have bequeathed to my brother Cormac, and to my sisters Mary and Ann." The testator never had a brother named Cormac, but he had a nephew Cormac, son of his brother James the complainant, who, at the time of making the will, was pursuing classical studies in Ireland, with a

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v.
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view to an ecclesiastical education; and he was the only nephew of that name. The only brother or sisters of the testator who survived him or left any issue, were the complainant and the two sisters named in the will, unless another brother named Henry, who left the family residence in Ireland unmarried thirty years since, and who had not been heard of by the family for many years, was then living. This was an amicable suit, for the purpose of settling the complainant's rights under the will, and to protect the executors; to which suit Henry Connolly was made a nominal defendant, and the bill was taken *pro confesso* against him on a nine months' notice, published agreeable to the statute.

C. O'Conner, for complainant.

H. A. Fay, for the executors.

THE CHANCELLOR:—From the testimony in this cause, there can be no doubt of the mistake in the will, and that the complainant was intended as the residuary legatee, who is described by the testator in the will as his brother Cormac. He could not have intended it for his brother Henry, because it is in evidence that the testator said he had made inquiries for him in this country, but could hear nothing of him, and supposed him to be dead. The reference to this devise in the codicil, and the description of his nephew as the son of his brother Cormac, shows conclusively that the complainant was the legatee intended. The cases are very contradictory on the subject of admitting parol evidence to correct mistakes in testamentary dispositions, but this steers clear of the decisions in those cases where the admission of parol evidence has been most restricted. If a legacy was given by a testator to his brother John, and it turned out in evidence that he had but one brother, whose name was James, there could be no doubt that the latter would be entitled, because the description of

brother in that case would alone be sufficient, and the name might be rejected as surplusage.[1] In this case the legal presumption is, that Henry was dead, and that James was the only brother; and that the testator, in fact, believed so at the time he made his will. Again the codicil shows that the father of his nephew, Cormac, was the brother whom the testator intended as the object of his bounty. In *Thomas v. Stevens*, (4 John. Ch. Rep. 607,)[2] the late Chancellor Kent went much farther, and permitted a person not named or described at all in the will, to take a legacy, upon evidence that she was the person intended, there being no person of the name mentioned in the will.

The complainant is entitled to one-third of the residuum of the estate of the testator; but the executors were justified in submitting this question to the court, and must, therefore, be allowed to retain their costs out of the same.

[1] See *Smith v. Smith*, 1 Edw. Ch. 189; S. C., 4 Paige, 271; *Tudor v. Tirrell*, 2 Dana, 47.

[2] The case of *Beaumont v. Fell*, 2 P. W. 425, was recognized in this case as authority; and in *Tudor v. Tirrell*, 2 Dana, 47; but the authority of it is doubted in note 275, pp. 552, 559 of Cowen & Hill's notes to Phil. Ev. And seems at variance with the decision in *Miller v. Travers*, 8 Bing. 244.

*TOPPAN v. HEATH.

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Where two parties submit their differences to arbitrators, and agree to make the admission a rule of court, in a court of common law, pursuant to the act for determining differences by arbitrators, (1 R. L. 125,) the Court of Chancery will not entertain jurisdiction to set aside the award, unless injustice would be done.[3] Dec. 6th.

THIS was a motion to dissolve an injunction on bill and answer. A difficulty having arisen between the parties relative to the contract for building the Arcade, in the city

[3] *Campbell v. Western*, 3 Paige, 124; 2 R. S. (4th ed.) 775, sec. 10, 11.

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of New York, they submitted the same to arbitrators, and agreed that the submission should be made a rule of the Court of Common Pleas in that city. On the 31st of May, 1827, the arbitrators made an award against Toppan for the payment of \$2,202 89, of which he received a duplicate the following day from one of the arbitrators. A suit was afterwards commenced by Heath to recover the amount of the award, whereupon the complainant filed his bill, alleging sundry irregularities on the part of the arbitrators, and particularly that they examined a witness without oath, and in the absence of Toppan; on which bill a preliminary injunction was obtained. The defendant having put in his answer, a motion to dissolve the injunction was made and argued before the late Chancellor; but as the answer had been excepted to, the motion was denied. The exceptions having since been answered, the motion was now renewed.

T. H. Flandereau, for the complainant.

H. Bleecker, for the defendant.

THE CHANCELLOR :—It appears by the answer of the defendant, that at the next term after making the award, the complainant applied to the New York Common Pleas to set aside the same, in pursuance of the provisions of the statute; and that afterwards, upon hearing the case upon the merits, the application was denied, with costs. This allegation in the answer not being responsive to any thing contained in the bill, I have not taken it into consideration on this *motion, but have considered the question as if the complainant had neglected to apply to that court for relief.

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The principles on which a court of equity relieves against an award of arbitrators, are pretty well settled and understood; and this court has frequently had occasion to advert to them; (*Herrick v. Blair*, 1 John. Ch. R. 101; *Woodworth v. Van Buskirk*, id. 432; *Shepherd v. Merrill*, 2 John. Ch. R. 276; *Todd v. Barlow*, id. 551.) And in the case of

Van Cortlandt v. Underhill, (17 John. Rep. 405,) Spencer and Yates, Justices, and Allen, Senator, who delivered opinions in the Court of Errors, went into the subject at length. The same questions are also ably examined by one of the judges of the Court of Appeals in South Carolina, in the case of *Shinnie & Loomis v. Coil*, (1 M'Cord's Ch. R. 478.) It would therefore be useless for me to go over that ground. Neither is it necessary to the decision of this motion, that I should compare the facts stated in the bill and admitted by the answer, with the principles which have been sanctioned in the cases referred to, although upon such examination it might appear that the alleged irregularities in this case were not sufficient to vitiate the award, as I prefer placing the decision of the court upon the other question which has been raised by the counsel on the argument.

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Ought this court to entertain jurisdiction to set aside an award of arbitrators, where the parties have expressly agreed that the submission shall be made a rule of another court, "to the end that all the matters in difference between them shall be finally concluded by such arbitration, in pursuance of the act for determining differences by arbitration," (1 R. L. 125,) and where there is no pretence that such court was not fully adequate to give the relief sought? especially when there is no allegation that the complainant has been deprived of his remedy in that court by any mistake, fraud or accident?

The first case I have been able to find in the English reports is *Simmons v. Mullins*, in the Exchequer. (Bunb. R. 182.) That appears to have been the case of a common injunction, obtained on the allowance of exceptions to an insufficient answer. If so, it was granted as a matter of *course, without inquiry into the equity of the bill on which it was founded. An application was afterwards made for leave to proceed and examine the complainant on interrogatories in the King's Bench, of which court the award had been made a rule. The application was granted,

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and a strong intimation was given against the proceeding in equity, although the question of jurisdiction does appear to have been distinctly raised.

A few years afterwards, the case of *Allardes v. Campbell*, (Bunb. 265,) came before the same court, and the question was distinctly raised by the defendant's plea; but the judges were divided in opinion, and finally the plea was ordered to stand for an answer. That case does not appear to have again come before the court.

In the case of *Lord Lonsdale v. Littledale*, (2 Ves. jun. 450,) Lord Rosslyn expressly declares that the jurisdiction of the Court of Chancery is not barred by a reference under the statute. But the case before him was an award in a cause pending, which he admitted was not within the statute. The opinion was, therefore, uncalled for and extra judicial; and it has not been sanctioned by subsequent decisions. The same remarks may be applied to the dictum of Sir Thomas Plumer, in *Steff v. Andrews and wife*, (2 Mad. Rep. 6,) in which case he expresses an opinion that the Court of Chancery has jurisdiction, if the submission has not actually been made a rule of court. But he admits if it had been made a rule of court, in pursuance of the agreement, Chancery could not interfere.

The question came before Lord Eldon in *Nichols v. Charlie*, (14 Ves. 265,) and after expressing very strong doubts as to the authority of the court to interfere, he denied the application for an injunction, but left this question undecided.

Afterwards, in the case of *Gwinnett v. Bannister*, (14 Ves. 530,) the same point came again before him, on a bill filed to set aside an award upon a submission which had been made a rule of the Court of King's Bench. He then decided that the court had not jurisdiction, and stated that he had consulted with some of the judges on the subject, and that they agreed with him in opinion.

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*The question was afterwards fairly presented at the Rolls, in the case of *Goodman v. Sayers*, (2 Jac. & Walker,

249,) but was not noticed by the defendant's counsel or the court, and the bill was dismissed on other grounds. But in *Davis v. Getty and others*, in June, 1828, (1 Simons' and Stewart's Rep. 411,) the precise question presented by the complainant's bill in this cause came before Sir John Leach; and he decided that where there was an agreement that the submission should be made a rule of a court of common law, Chancery had no jurisdiction to relieve against the award, although the complainant had lost his remedy in the common law court, the time limited by the statute having elapsed. In delivering the opinion of the court, the Vice-Chancellor says, "I consider it to be the duty of the party who means to complain of the award, to make the submission a rule so as to give the proper court jurisdiction; and that if he fail to do this in due time, he cannot, by his own default, create a new jurisdiction in this court, and defeat the limitation of time fixed by the statute."

In December of the same year, the case of *Dewson v. Sadler* (1 Simons & Stewart, 537) came before the same court. In that case, the agreement was that the submission might be made a rule of the King's Bench or Court of Chancery. The complainant filed his bill in the latter court, within the time prescribed by the statute for making the submission a rule of court, and gave notice of a motion for an injunction. Two days after, and before the motion could be made, the defendant caused the submission to be made a rule of the King's Bench, and showed that for cause against the application. It was, thereupon, again decided that no court but that of which the submission was made a rule, had jurisdiction to set aside an award under the statute; and that filing a bill was not equivalent to making the submission a rule of the Court of Chancery, because the object of the statute was to create a summary jurisdiction for the decision of such causes.

Our statute is substantially the same as the 9th and 10th William 3, ch. 15. The object of the second section undoubtedly was, as suggested by Sir John Leach, to afford

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a summary method of deciding upon the validity of awards, *where the parties had consented in their agreement of submission to refer the question to such a tribunal. The limitation in that section of the statute seems to be entirely useless, if the party in whose favor an award is made is still to be subjected to the expense and delay of a protracted Chancery suit.

I am aware that the mode of examining the defendant on oath as practised in this court, is sometimes of essential benefit to the complainant in eliciting facts which possibly the party might not be able to discover by the summary method of proceeding to set aside the award. When the submission is made a rule of court, the statute has not prescribed the mode of proceeding to ascertain the facts; and perhaps the court might, on a proper cause being presented upon affidavit, order the defendant to answer on oath as to any matters alleged to be within his knowledge only. But even if this were not the case, the privilege of compelling an answer on oath in this court, is one which the party, under the provisions of the statute may consent to waive; and for this he receives an equivalent in the saving of time and expense, and the privilege of selecting his own judges to determine the controversy in the first instance, and also the tribunal by which their proceedings are to be reviewed.

I am not prepared to say this court will in no case take cognizance of a cause where the parties have agreed to make their submission a rule of some other court. Although a party may not be compelled, in consequence of an antecedent agreement, to submit to palpable injustice, yet when he has made an agreement under the sanction of a legislative enactment, to submit his rights to a particular forum, and to a particular mode of proceeding, if he applies to be relieved from the effect of that government, he ought at least to show that injustice would probably be done were he compelled to submit his rights to the adjudication of the forum which he had selected for that purpose.

In this case, there is no pretence in the complainant's bill that the Court of Common Pleas was not fully adequate to grant the relief sought; and if, as appears by the answer, he has made his application there, and that relief has been *denied, I am bound to presume it was because he had no merits in his case, as that court had authority to set aside the award for any of the causes mentioned in the bill, on which this court would be authorized to grant similar relief. The injunction must, therefore, be dissolved.

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Haggarty
v.
Pittman.

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HAGGARTY AND OTHERS v. PITTMAN, STRONG AND BOVEE.

Where a debtor, in falling circumstances, assigns his property to a person who is insolvent, in trust for his creditors, a receiver will be appointed upon the application of such creditors to take charge of the property so assigned.[1]

THE defendants Strong and Bovee were indebted to the complainants and others on various notes, on which the defendant Pittman was the indorser. They also owed him \$680, for money borrowed. In August, 1828, Strong and Bovee failed, and to secure Pittman, as their indorser and pay the money lent, they assigned to him a great number of demands against different individuals to a large amount. The complainants filed their bill in behalf of themselves and all others, standing in the same situation as creditors of Strong and Bovee, and having Pittman as security; alleging, among other things, that Pittman was insolvent, and praying an account and satisfaction of their respective debts out of the demands so assigned, and for an injunction and receiver. In opposition to the direction, an affidavit

[1] *Connah v. Sedgwick*, 1 Barb. S. C. R. 210. The appointment of such an assignee is *prima facie* evidence of fraud. *Reed v. Emery*, 8 Paige, 417; *Browning v. Hart*, 6 Barb. S. C. R. 91; see also *Keys v. Brnsh*, 2 Paige, 311.

1828. of Pittman was read, denying any intention to misapply the funds, and alleging that enough had not yet been collected to pay him the amount due for money borrowed.

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M. C. Patterson, for the complainants, cited *Bank of Auburn v. Throop*, (18 John. 505;) *Monell v. Smith*, (5 Cowen, 441;) *Maule v. Harrison*, (1 Eq. Cases Ab. 93.)

S. A. Foot, contra, cited *Orphan Asylum Society v. McCarty and others*, (1 Hop. R. 429.)

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*THE CHANCELLOR:—The allegation in the bill, that Pittman is insolvent, is not denied in his affidavit. This court will never, for a moment, sanction the idea that debtors in failing circumstances shall be permitted to put their creditors in the power of an insolvent assignee, by a voluntary assignment of their property to him, although it is expressed to be for the payment of their debts, or for his indemnity against prior responsibilities. They may lawfully prefer one creditor to another, and indemnify their sureties in preference to either; but they have no equitable right to jeopardize the honest claims of any, by assigning their property to trustees who are irresponsible. And the proper course for this court in such cases is to appoint a receiver, on the application of the parties for whose benefit the fund is assigned. Where the assignment is to a surety for his indemnity, the creditor has an equitable claim upon the fund for the payment of his debt; and the surety has no right to divert it to any other object. *Bank of Auburn v. Throop*, 18 John. Rep. 505; *Maule v. Harrison*, 1 Eq. Ca. Abr. 93; 11 Ves. Jun. 22; 5 Bac. Abr. tit. *Obligation*, D. 4.)

In this case the assignee is personally responsible for the payment of the complainant's debts, and cannot, therefore claim to retain the demands assigned until they pay his private debt due from the assignor. A receiver must be appointed, with the usual powers, and a reference to a master is directed, to appoint a suitable person and to decide as to

the amount and competency of sureties to be given. But the defendant Pittman is not required to pay over the money actually collected by him, under the assignment, except so far as it exceeds the amount of his own debt.

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Lewis
v.
Germond.

*LEWIS v. GERMOND AND ANOTHER.

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In no case can a complainant, unless he prosecutes as executor or administrator, dismiss his bill without the payment of costs, not even if it should appear he would be entitled to a decree if he proceeded in the suit.[1]

*THIS was a motion on behalf of the complainant for Dec. 19th. leave to discontinue this suit without costs, upon the ground that he had probable cause for commencing it, and that he had, since that time, sold the property which was the whole subject matter of the controversy in this suit.

THE CHANCELLOR:—By the English practice, it is necessary in every case to bring the cause to a hearing, if the complainant wishes to get rid of costs; although from the facts of the case, it clearly appears that if he had gone on, he would have been entitled to a decree. *Dickson v. Parks* 1 Ves. jun. 402; *Anonymous*, id. 140; *Fidele v. Evans*, 1 Cox's Ca. 27. The 16th section of the act concerning costs, (1 R. L. 348,) provides, that upon the plaintiff's dismissing his own bill in equity, or the defendants dismissing the same for want of prosecution, the plaintiff shall pay to the defendant full costs to be taxed. In the case of *Arnoux v. Steinbrenner*, (*ante*, 82,) this court decided, in analogy to the practice of the Supreme Court, that in the case of an executor who would not be liable in any event, and where the object of the suit was put an end to by circumstances not within his control, he might have his bill dismissed without the necessity of setting it down for a hearing.

[1] See *Hammersly v. Barker*, 2 Paige, 372.

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Ashworth
v.
Wrigley.

In this case, it is certainly not clear that the complainant would be entitled to a decree at the hearing; but, on the contrary, the dissolution of the injunction shows that the late Chancellor was against him on the bill and answer. Without reference to the merits of the controversy, I am satisfied that the voluntary sale of the subject matter of the litigation, by the complainant, does not alter his rights in this respect, and that he is not entitled to dismiss his bill without costs.

The bill must be dismissed, with costs, unless he elects within twenty days to proceed to a hearing.

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*D. ASHWORTH AND OTHERS v. WRIGLEY.—J. ASHWORTH AND OTHERS v. THE SAME.

Where a defendant in a bill for an account and payment of demands founded on contract, has been discharged under the non-imprisonment act, a writ of *ne exeat* against him will be discharged.[1]

The writ will not be retained on a single affidavit that a *certiorari* has been allowed for the purpose of reserving the discharge obtained under the insolvent act.

This court may hold the insolvent to bail in cases of fraud.

But whether it would retain a *ne exeat* on the affidavit of mere irregularity in obtaining the discharge? *Quære*.

Dec. 19th.

ON the first of October, 1828, bills were filed in these causes, calling upon the defendant for an account and satisfaction of the proceeds of the sales of certain goods assigned to him by the complainants respectively, as their agent or factor, to be sold. On the bill and the petition presented therewith, the injunction master allowed a *ne exeat*. On the fourth of October the defendant was discharged by the recorder of New York, under the non-imprisonment act;

[1] 2 R. S. (4th ed.) 210, sec. 10; see also *Luther v. Deyo*, 19 Wen. 629; *Hayden v. Palmer*, 24 Wen. 364; *O'Connor v. Lerbaine*, 3 Edw. Ch. 230.

and on the same day, and after the discharge, the defendant was arrested on the *ne exeat*, and compelled to give bail thereon. Upon an affidavit of these facts, the defendant's counsel moved to discharge the writs of *ne exeat*. The motion was opposed upon an affidavit that a *certiorari* had been allowed by one of the justices of the Supreme Court, for the purpose of reversing the discharge of the recorder, and that the defendant had not answered, but had procured orders for further time.

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Ashworth
v.
Wrigley.

D. Selden, for the motion.

H. Bleecker, contra.

THE CHANCELLOR :—There is no allegation of fraud in these bills; they are simply for an account and payment of demands founded on contract. There is therefore nothing *to prevent the discharge, if valid, operating to exempt the body of the defendant from imprisonment for these demands. The mere fact that a *certiorari* has been allowed, without stating in what the proceedings before the recorder were erroneous, so that this court could judge whether there is probable cause to reverse the same, is not sufficient. The discharge is at least *prima facie* evidence that the defendant is exempt from imprisonment. If there was fraud or irregularity in obtaining it, there should have been an affidavit of the fact. Whether this court would have retained the writs on an affidavit of irregularity merely, it is not necessary now to inquire. Cases of fraud are provided for in the second section of the act. (Laws of 1819, page 116.)[1] This court may hold to bail upon evidence of fraud.

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The writs of the *ne exeat* must be discharged.

[1] 2 R. S. (4th ed.) 210, sec. 10.

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THE TRADESMAN'S BANK AND THE CHEMICAL BANK
MERRITT.

A defendant cannot object that another person, not a party to the suit, is also enjoined.

If such a person makes a proper application, the court will discharge the injunction, so far as it affects his interest.

Where the defendant, by a fraudulent overdraw, obtained the complainant's money and deposited it to his own credit in another institution, held, that the title to the property was not changed, and might be reclaimed by the owners.

On a motion to dissolve an injunction, the court will not listen to an objection of misjoinder of complainants, where the merits of the case are clearly against the defendant.

January 7th.

THE bill in this cause charged the defendant with having fraudulently overdrawn the banks of the complainants, and that the identical bills obtained from those banks had been deposited by him in the Branch Bank of the United States in the city of New York, where they still remained to his credit on the books of that institution. On this bill the master allowed an injunction restraining the defendant from withdrawing or assigning that deposit, and prohibiting the Branch Bank of the United States from paying out the same. A motion was now made for the dissolution of the injunction upon the matter of the bill only.

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J. Smith, for defendant :—The injunction was improperly granted against the Branch Bank of the United States, they not being parties to the bill. (*Fellows v. Fellows*, 4 John. Ch. R. 25.) The complainants are merely simple contract creditors of the defendant, and having obtained no judgment against him, have acquired no lien either on his real or personal estate; and even if they had obtained a judgment, they could not, by the aid of this court, resort to the funds of the defendant in the Branch Bank of the United States for the satisfaction of their debt. The defendant

has not perpetrated any such gross fraud as would call for the interposition of the powers of this court. The defendant overdrew the banks of the complainants in the ordinary course of business, with their consent; and their only remedy against him is by an action at law. The complainants cannot know and cannot establish that the same bills the witness drew from the banks of the complainants were deposited by him in the Branch Bank of the United States. It is not alleged that the defendant is insolvent. (*Dawes v. Moran*, 1 Hopk. Ch. R. 365.) There is a misjoinder of the complainants. They have separate and distinct demands against the defendant. Neither the bill nor the injunction can be sustained for this reason. (*Brinckerhoff v. Brown*, 6 John. Ch. R. 152.) No injunction can be granted, if the bill would be bad upon demurrer. (*Harrison v. Hogg*, 2 Ves. jun. 323; *Dickens*, 677; *Birkley v. Presgrave*, 1 East, 226; *Dilly v. Doig*, 2 Ves. jun. 486; 2 Anstruther, 469. And a misjoinder is a ground for a demurrer *ore tenus*. (*Saxton v. Davis*, 18 Ves. 72; 1 Hopk. Ch. R. 418.)

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J. Leveridge, for complainants:—This is not the ordinary case of debtor and creditor, arising out of customary business transactions. Here no credit was given to the debtor, nor profit charged. The complainants did not consent to the creation of this debt. The defendant knew, from the established rules of business at the bank, that no checks were *paid beyond the funds of the drawer in the bank. In this case, a fraud was meditated by the defendant. He, possessing a knowledge of the state of his accounts at the banks of the complainants, wilfully overdrew. The cases of *Brinckerhoff v. Brown*, (4 John. Ch. R. 671,) of *Williams v. Brown*, (id. 682,) and of *McDermut v. Strong*, (id. 687,) arose from ordinary business transactions, and are therefore not applicable to this case. The defendant has not answered the bill; he thus admits the fraud; and wherever fraud appears, and the remedy at law is insufficient, Chancery will grant relief. To turn the complainants over to

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1829. their action at law, would amount to a denial of justice.
 Tradesman's Bank Injunctions have been granted upon the application of simple contract creditors. (*Taylor v. Jones*, 2 Atk. 600.) The
 v. complainants have shown a case of gross fraud, and they
 Merritt have shown that the identical money obtained from the
 banks of the complainants was deposited in the United
 States Branch Bank. The court will therefore retain the
 injunction.

THE CHANCELLOR:—The objection that the United States Branch Bank is enjoined, although not a party defendant, does not properly come from the party moving to dissolve the injunction allowed in this cause. If the defendant does not violate the injunction, the deposit cannot be withdrawn from the United States Branch Bank, and the injunction as to that bank will be nugatory. Where persons not parties to the bill are injuriously affected by an injunction, if they apply in a proper manner, the court will grant them relief.

If the money was fraudulently obtained from the complainants, as alleged in the bill, the property was not changed by paying it out on the draft, and they may follow it into the hands of any person who has not taken it in the course of business, and allowed an equivalent therefor, without notice of the fraud. The complainants are not creditors at large, but have a specific lien upon the fund in the case stated in the bill.

As to the misjoinder of the complainants, it is a matter of form only, and does not go to the merits of the question upon which the injunction rests. I am not certain that in a clear case of misjoinder of complainants, the defendant
 [*805] *would be entitled to have the injunction dissolved as a matter of course, before demurrer or answer. In this case, the fact that the moneys alleged to have been obtained from the respective complainants by fraud were deposited together, forming an entire fund, on which both have equita-

ble claims, may perhaps be sufficient to authorize them to proceed jointly.

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The motion to dissolve the injunction is denied, with costs.

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v.
Burdett

BECK v. J. & B. C. BURDETT.

Where property is subject to an execution, and a fraudulent obstruction is interposed to prevent the sale, a creditor may file his bill here to remove the obstruction as soon as he has obtained a specific lien upon the property, by the issuing of his execution.

But if the property is not a subject of levy and sale on execution, the creditor must show his remedy at law exhausted by an actual return of the execution unsatisfied, before he can file a bill in this court to reach the equitable property of the debtor.

If such property is not a subject of sale by the sheriff, the creditor obtains no specific lien or preference until his execution is returned unsatisfied, and he has followed up his remedy by the commencement of a suit in this court, to reach the debtor's equitable assets.[1]

When a debtor in failing circumstances assigns an unreasonable amount of property to satisfy a single creditor, it is evidence of fraud;[2] but if no more than is supposed to be sufficient to satisfy the debt is assigned, a mere hypothetical reservation of the surplus, if any there should be, to the debtor, would not render the assignment void.

In July, 1825, B. C. Burdett gave to the complainant a note for a *bona fide* debt. A judgment was obtained thereon in the Supreme Court in May, 1826, and a *feri facias* was issued to the sheriff of New York, returnable on the 13th of the same month. The sheriff returned the execution unsatisfied. The bill in this cause was filed after the return day of the execution, but before the writ was actually returned and filed in the clerk's office. Before the commencement of the suit upon the note B. C. Burdett

[1] *Grosvenor v. Allen*, 9 Paige, 74; see *Ellis v. Tinsley*, *ante*, 280, n.

[2] *Butler v. Stoddard*, 7 Paige, 163.

1839. failed, and assigned all his property, consisting of goods, debts and choses in action to J. Burdett, in trust to collect the debt and sell the goods, and apply the proceeds to the payment of certain *creditors named in a schedule annexed to the assignment, and to pay the residue of the proceeds, if any, to the assignor. Goods to the value of \$600 remained unsold in the hands of the assignee at the time of issuing the execution. The object of the bill was to set aside the assignment. The complainant prayed that the same might be declared fraudulent as against him, and that the goods remaining unsold might be applied in satisfaction of the judgment; and, if the same were insufficient for the purpose, that J. Burdett might be decreed to pay the balance of the judgment out of the proceeds of other property obtained under the assignment. The cause was heard on pleadings and proofs.

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C. Baldwin, for the complainant:—The assignment from B. C. Burdett to Jacob Burdett is void, because it does not provide for all the creditors of B. C. Burdett, and because it reserves the surplus to B. C. Burdett after paying certain specified creditors. An assignment with intent to protect property from creditors is void by statute. An insolvent may prefer one creditor to another, but he cannot make an assignment, either altogether in trust for himself, or partly in trust for himself and partly for the payment of an honest creditor. If void in part, it is void in *toto*. (*Mackay v. Cairnes*, 5 Cowen, 547.) Any reservation by an insolvent in an assignment, in favor of himself, renders the assignment void. (2 Kent. Com. 421.) If the assignment is void in its inception, subsequent events cannot make it good; such as the property assigned being insufficient to satisfy the confidential creditors. If so, the debtor or his assignee can make a fraudulent assignment good by not collecting more than is sufficient to satisfy the preferred creditors. This would hold out a temptation to sacrifice the property, and thus violate the trust. The property in this case as-

signed, exceeded in value the debts for the security of which it was assigned. The reservation in the assignment shows that this was the belief and understanding of the parties to it. (*Hyslop v. Clarke*, 14 John. 458; *Austin v. Bell*, 20 John. 442, per Spencer, Ch. J.) A creditor is not bound to levy on property fraudulently assigned, before applying for relief in Chancery. *(*Haddan v. Spader*, 20 John. 554, 572, 78, per Platt, J.; *Donavan v. Finn*, Hopk. Rep. 77.) It was not necessary that the *fi. fa.* in this case should have been actually returned and filed before the filing of the bill. It was sufficient if the return day had passed, and there was no property which it could reach. (Mitf. Pl. 102, 3d Lond. ed.; 3 Atk. 200; Cooper's Eq. Pl. 149, 1st ed.; *Brinckerhoff v. Brown*, 4 John. Ch. R. 671; *Williams v. Brown*, 4 John. Ch. R. 682.) Suppose the execution was lost, then it could not have been filed. The case of *Balch v. Wastall*, (1 Pr. Wms. 445,) is the only one in which a *dictum* can be found that a return of the execution is necessary

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J. L. Mason for defendants:—There was no fraud in fact in this case; and there being in the assignment no absolute reservation in favor of the assignor, there is no fraud in law. A debtor may prefer one creditor to another. If the assignment had contained no reservation whatever, and there had been a surplus, a resulting trust would have arisen in favor of the debtor. The reservation, therefore, in this assignment is mere surplusage. (*Wilkins v. Ferris*, 5 John. 335; *Wilder v. Winne*, 6 Cowen, 284; *Hendricks v. Robinson*, 2 John. Ch. Rep. 283.) If the security be not manifestly excessive in favor of a particular creditor, and there should happen to be a surplus, it would not vitiate the assignment if the transaction was *bona fide*. *Stevens v. Bell*, 6 Mass. R. 339.)

In this case the assignment was only a part of the debtor's property. The court will not presume in the absence of proof, it was of the whole property of the debtor. (*Wilkes & Fontaine v. Ferris*, 5 John. 335.) The creditor,

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Jacob Burdett, did not realize his debt out of the property assigned to him, which fact repels all presumption of fraud. The bill in this case was prematurely filed, it being before the actual return of the execution unsatisfied. The complainant is in all cases bound to show that he sued out execution, and pursued it to every possible extent before he filed his bill. (*Brinckerhoff v. Brown*, Ch. R. 671; *Williams v. Brown*, 4 John. Ch. R. 681; *McDermut v. Strong*, 4 John. Ch. R. 691; *Hadden v. Spader*, 20 John. 554; *Angel v. Draper*, 1 Vernon, 399.)

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*THE CHANCELLOR:—The defendants deny all actual fraud in relation to the assignment, and there is no evidence from which it can be inferred; therefore, the only questions of any importance in this case are as to the right of the complainant to commence proceedings here, before the execution was returned by the sheriff; and whether the assignment is void, in consequence of the reservation of the surplus to the assignor, without making any provision for the payment of the complainant's debt.[1]

There are two classes of cases where a plaintiff is permitted to come into this court for relief, after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction, fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property

[1] It has been repeatedly held, that an assignment of part, or all the debtor's estate, providing for only a part of the creditors, and, without making provision for the rest, directing the assignee to pay back or re-assign to the assignor the surplus remaining after satisfying the debts provided for, is fraudulent and void. *Goodrich v. Downs*, 6 Hill, 438; *Strong v. Skinner*, 4 Barb. S. C. R. 546; *Lansing v. Woodworth*, 1 Sanf. Ch. 43; *Barny v. Griffin*, 4 id. 552; S. C., 2 Comst. 365; *Leitch v. Hollister*, 4 id. 211. The same principle prevails in Ohio. *Suydam v. Martin*, Wright Ch. R. 698.

of the defendant, which cannot be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies, without being able to obtain satisfaction of his judgment. In the first case, the plaintiff may come into this court for relief, immediately after he has obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same is situated; and the obstruction being removed, he may proceed to enforce the execution by a sale of the property, although an actual levy is probably necessary to enable him to hold the property against other execution creditors on *bona fide* purchasers. *Angel v. Draper*, (1 Vern. 399,) and *Shirley v. Watts*, (3 Atk. 200,) are cases of this description. In the first, a fraudulent assignment was interposed to prevent a sale of the defendant's property on execution; and in the last case it became necessary to redeem a term for years in a leasehold property, from a lien of a prior mortgage. In both these cases the plaintiffs were allowed to come into equity for relief, before the executions were returned unsatisfied. *McDermut v. Strong*, (4 John. Ch. R. 687,) belongs to the other class of cases; for although an attempt was made to *levy the execution upon the defendant's interest in the vessel assigned, it is clear he had no interest which was a proper subject of seizure and sale on the execution. The issuing of an execution, or even a formal levy, can create no lien upon a chose in action, or a mere equitable interest in personal property, which is not liable to be sold on execution. In such cases, the actual return of the execution unsatisfied, is necessary to give this court jurisdiction to decree satisfaction out of the equitable property of the defendant. Such is the construction recently adopted by the legislature in such cases. (R. S. part 3, ch. 1, tit. 2, sec. 38.) And a similar principle is adopted in that part of the Revised Statutes which enables creditors to reach the equitable interest of persons holding lands under contracts for the purchase thereof. (R. S. part 2, ch. 1, tit. 4, sec. 4.) In all

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these cases, where the property is not liable to an execution at law, the plaintiff obtains no lien upon the property or fund, by the issuing or return of the execution. But it is the filing of the bill in equity, after the return of the execution at law, which gives to the plaintiff a specific lien. (Per Lord Hardwicke in *Edgell v. Haywood*, 3 Atk. Rep. 357.)

The bill in this case contains the proper allegation that the execution had been returned unsatisfied. That fact is denied by the answer; and the evidence in the case supports that denial. The bill, therefore, was prematurely filed, and no relief can be granted thereon, except as to the goods which remained unsold at the time the execution issued. If the assignment was fraudulent, they are liable to be seized and sold on the execution. J. Burdett has since sold those goods; and if he improperly covered them from a levy and sale by the sheriff, he must account to the plaintiff for their value. It, therefore, becomes necessary for the court to examine the other question in this cause.

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If a debtor in failing circumstances makes an assignment of his property for the benefit of part of his creditors only, and the value of the property assigned is more than the parties could have reasonably supposed necessary to satisfy the claims of those creditors, fraud may be inferred from that *circumstance alone, unless a satisfactory excuse is shown for the transfer of the excess. But in this case it was, at the time of the assignment, and still is doubtful, whether the property assigned was sufficient to satisfy the claims of the creditors for whose benefit the assignment was made. Their debts were rising of \$26,000, and the whole nominal amount of property and demands assigned, including \$21,000 of outstanding claims, is short of \$34,000. It was therefore not probable there would be any excess, after making due allowance for bad debts, and deducting the expenses of collection, and of executing the trust.

Does then a mere hypothetical reservation of the surplus, if any there should be, to the assignor, vitiate the assignment? It certainly does not alter the legal liability of the

assignee, because, without that provision, he would inequity be compelled to account for the surplus. In *Wilkes & Fontaine v. Ferris*, (5 John. Rep. 335,) it was settled, that an implied reservation of the residue to the assignor did not render the assignment void; and in *Stevens and others v. Bell*, (6 Mass. Rep. 339,) and in *Passmore v. Eldridge*, (12 Serg. & Rawle, 198,) although express reservations of the surplus were made to the assignors, the assignments were sustained.

The case of *Mackie v. Cairns*, (5 Cowen, 547,) establishes the principle that an insolvent cannot legally make a provision for himself or family, even for a limited period, out of the property which belongs to his creditors; and that such a provision, contained in a general assignment of his property, rendered the assignment void as against creditors who had not assented thereto. But on a careful review of the cases on this subject, I am satisfied that the assignment complained of in this case was a valid instrument, and that it does not come within the principle of the decision in *Mackie v. Cairns*.

The bill in this cause being prematurely filed, the complainant is not in this suit entitled to an account and satisfaction of his debt, out of the surplus of the assigned property, if any there should be. His bill must therefore be dismissed with costs.

*THE FULTON BANK v. THE NEW YORK AND SHARON CANAL COMPANY AND OTHERS. [311]

An injunction against a corporation cannot be dissolved on bill and answer, unless the answer is duly verified by the oath of some of the corporators who are acquainted with the facts stated therein.

THIS was a motion to dissolve an injunction upon bill January 7th. and answer. Brown and Reed, two former officers of the

1829. Fulton Bank v. N. Y. & Sharon Canal Co. New York and Sharon Canal Company, were made defendants for the sake of discovery merely. The canal company put in their answer under the corporate seal; and the present secretary, who was not an officer of the company at the time of the transactions which were the foundation of the injunction, swore that the matters stated in the answer relating to his acts and deeds were true, and so far as related to the acts and deeds of other persons, he believed them to be true. The president, who was an officer of the company at the time of those transactions, swore to the seal of the company affixed to the answer, but said nothing as to the truth of the matters stated therein. The separate answer of Brown admitted the truth of the principal allegations contained in the bill. •

D. B. Ogden, for complainants.

S. P. Staples, for the New York and Sharon Canal Company.

THE CHANCELLOR:—The case of a corporation defendant is an anomaly in the practice in relation to the dissolution of an injunction. In most cases the injunction is dissolved as a matter of course, if the answer is perfect, and denies all the equity of the bill in the points upon which the injunction rests. It is not, however, a matter of course to dissolve the injunction where the defendant acts in a representative character, and founds his denial of the equity of the bill upon information and belief only. Corporations answer under their seal and without oath. They are therefore at liberty *to deny every thing contained in the bill, whether true or false. Neither can any discovery be compelled, except through the medium of their agents and officers, and by making them parties defendants. But no dissolution of the injunction can be obtained upon the answer of a corporation, which is not duly verified by the oath of some officer of the corporation, or other person who

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is acquainted with the facts contained therein. There can be no hardship in this rule as applied to corporations, as it only puts them in the same situation with other parties. Other defendants can only make a positive denial as to facts within their own knowledge. In relation to every other matter, they must answer as to information and belief. If the agents of the institution, under whose direction the answer is put in, are acquainted with the facts, so as to justify a positive denial in the answer, they can verify its truth by a positive affidavit; and if none of the officers are acquainted with the facts, their information and belief can have no greater effect than that of ordinary defendants, however positive the denial in the answer may be.

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In this case, the officer of the institution, who was such at the time referred to in the complainants' bill, has studiously avoided saying any thing as to the truth of the answer, leaving it to the secretary, who knows nothing of its truth or falsehood, to express his belief on the subject.

The motion to dissolve the injunction must be denied, with costs.

KEELER AND FREEMAN v. FIELD AND OTHERS.

Where a merchant contracted for goods, the price to be secured by his note indorsed by B. and C., and the goods in the meantime were forwarded to his residence, held, that the property was not changed until the delivery of the note, and that B. & C. to whom he had assigned the goods to secure an antecedent debt, could not hold them against the vendor.

THE defendant Field, a merchant in Marcellus, applied January 7th. to the complainants at New York, to purchase a quantity of goods on credit. They were unwilling to let the goods go on his individual credit, but consented to put up the goods and *forward them to him at Marcellus, he engaging, on his return home, to send them his notes, indorsed by

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Bixby and Chapman, for the amount. The goods were accordingly selected by Field, and notes for the amount drawn by the complainants and delivered to him, to be returned to them after being thus indorsed. The goods were put up and forwarded to Field at Marcellus, and were duly received by him. But instead of sending the notes to the complainants, he never requested Bixby and Chapman to indorse them; and soon after the goods arrived, he assigned the same, together with his whole stock in trade, to Bixby and Chapman, to secure them for responsibilities which they had previously incurred, and to pay the surplus, if any, to his creditors generally. The complainants filed their bill in this cause, and prayed an injunction to prevent Bixby and Chapman from selling the goods thus obtained. The answers admitted the principal matters alleged in the bill, but the defendants, Bixby and Chapman, denied all knowledge or information as to the complainants' rights, or the manner in which the goods had been obtained, until since the filing of the bill.

Wells and Bushnell, for the complainants:—The complainants have an equitable lien on the goods sold to the defendant Field. The sale was upon condition, and the condition not having been performed, the title to the goods never passed to Field; and Field, therefore, never acquired any right which could be conveyed by a voluntary assignment to the defendants Bixby and Chapman. A voluntary assignment of goods by an insolvent debtor, to pay other creditors than the person from whom they were purchased, was an act of fraud upon him, and could not defeat his equitable lien. (*Haggerty v. Palmer*, 6 John. Ch. R. 437.) Fraud, in cases of this kind, will be presumed in law, except as to *bona fide* purchasers for a valuable consideration, and without notice. (*Hussey v. Thornton*, 4 Mass. R. 405; *Palmer v. Hand*, 13 John. R. 434; *Coddington v. Bay*, 20 John. R. 637.) An assignment in bankruptcy does not defeat an equitable lien. (Lord Seaforth, *ex parte*, 19 Ves.

235.) Neither does an assignment under our insolvent laws, nor an attachment, nor a *judgment. (*Kip v. The Bank of New York*, 10 John. R. 68; *Jackson v. Dubois*, 4 John. R. 216; *Buffington v. Gerrish*, 15 Mass. R. 156.) Persons taking under an act of law, without notice of an equitable lien, take subject to it. Sugden on Vendors, 398.) The defendants, Bixby and Chapman, have confounded a part of the goods with their own. The rule of law requires them to distinguish the goods so mixed, or to lose their own. (*Hart v. Ten Eyck*, 2 John. Ch. R. 62.) The circumstances of the case show clearly fraud in fact. The costs ought to be charged upon the goods assigned to Bixby and Chapman, exclusive of the goods of the complainants; and if they prove insufficient, then upon the assignees personally. They, by improperly refusing to deliver up the goods in question, have made themselves liable for the costs. (*Livingston v. Byrne*, 11 John. 555; *Gray v. Thompson*, 1 John. Ch. R. 82; *Tiernan v. Wilson*, 6 John. Ch. R. 411.)

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L. H. Sanford, for defendants Bixby and Chapman: There is no fraud imputable to Field. The property in the goods vested in him upon delivery; and the complainants, by giving possession of the goods to Field, lost all lien upon them for the purchase-money, although Field failed in performing his part of the contract. The only remedy of the complainants is an action against Field. If they had intended to retain their property in the goods, they should have refused to deliver them until the notes were obtained. (*Chapman v. Lathrop*, 6 Cowen, 110, 115; *Conyers v. Ennis*, 2 Mason, 236; *Hussey v. Thornton*, 4 Mass. R. 405.) The defendants, Bixby and Chapman, are *bona fide* assignees without notice, and are protected, although the sale to Field should be adjudged fraudulent. The rule is well settled that, although a person obtains goods by a fraudulent purchase, which is void as to himself, yet if he afterwards sell them to a *bona fide* purchaser without notice of the fraud,

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THE CHANCELLOR:—The sale of the goods in this case was conditional; and until the delivery of the indorsed notes the vendors retained a lien which could not be defeated by the voluntary assignment of the goods by Field, to secure antecedent debts or responsibilities.[1] The case of *Haggerty v. Palmer*, (6 John. Ch. Rep. 437,) is in point, and shows that the assignees cannot retain the goods obtained under such circumstances. It was a fraud on the part of Field, to assign the goods before he had procured and sent the indorsed notes. Although the other defendants were not aware of the fraud, at the time they took the assignment, they did not purchase and pay for the goods in the ordinary course of business, and are not entitled to retain them against the equitable claim of the vendors.

They are, however, only answerable for the goods set out in the schedule annexed to their answers, as there is no evidence in the cause, or admission in the answers, from

[1] See *Russell v. Minor*, 22 Wen. 659; *Corlies v. Gardner*, 2 Hall, (N. Y.,) 345. But if the vendor does not demand the note at the time of delivery, it is a waiver of the condition, and the goods pass to the vendee. *Lupin v. Marie*, 6 Wen. 77; *Hennequin v. Sands*, 25 id. 640; see also *Mills v. Hallock*, 3 Edw. Ch. 652.

which it can be inferred that they received any other part of the goods. As the complainants did not give information of their rights, and request a delivery of the goods previous to the filing of their bill, Bixby and Chapman are not chargeable with any part of the complainant's costs; but having resisted a legal claim, after they had obtained that information, they must bear their own costs.

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There must be a decree that Bixby and Chapman deliver to the complainants, at Marcellus, upon request, the goods mentioned in schedule A., annexed to their answer; and that the defendant Field, pay to the complainants the interest on the whole value of the goods received by him from the complainants, from the time the goods were assigned by him to Bixby and Chapman, until the delivery of that part of the goods to the *complainants; and that he also pay for the balance of goods which are not so delivered, with interest thereon, from the time when the goods mentioned in schedule A. are returned to the complainants.

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COUTANT v. SCHUYLER AND OTHERS.

A promissory note or a bond is a proper subject of a gift, *causa mortis*; and the delivery may be to a third person for the use of the intended donee. But claims of this kind are admitted with great caution; and where some doubt was thrown on the transaction, a feigned issue was awarded.

THE bill in this cause was filed against the administrators of W. Reynolds, deceased, and David Marsh, to recover the amount of a promissory note given by the latter to Reynolds, and which the complainant alleged was given by the intestate, in his last sickness, to Marsh, to be delivered to her as a gift, *causa mortis*.

The questions raised on the argument of the cause were:

1. Whether a promissory note was a proper subject of such gift:

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2. Whether it was in fact ever delivered for that purpose:

3. Whether the intestate was of sound and disposing mind and memory at the time he made such gift.

Much testimony was taken in relation to the two latter points. The amount of the note was paid into court by Marsh; and he was examined as a witness for the complainant. The cause was heard on pleadings and proofs.

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J. Smith, for complainant:—A promissory note may be the subject of a gift, *causa mortis*. Even a promissory note payable to order and not indorsed, would now be a proper subject of a gift, *causa mortis*, and the donee might prosecute the note in the names of the executors or administrators of the donor. In this case, an indorsement was not necessary, as the note was delivered to the maker, who was made a trustee for the donee, and accepted the trust. The reasons for the decision, that a promissory note could not be the subject of *a *donatio causa mortis* do not now exist. At the time this decision was first made in the English courts, the statute of Ann had not been passed, making notes and bills of exchange negotiable. At that time, also, choses in action were not assignable. Now, choses in action are assignable, and the mere delivery of a bond or note amounts to a valid assignment. Both these alterations in the law having since been made, the reason of the rule, that a promissory note could not be the subject of a gift *causa mortis*, having ceased, the rule itself ought to cease. (*Jones v. Selden*, Prec. in Chan. 300, year 1710; *Drury v. Smith*, 1 Pr. Wms. 404, in 1717; *Lawson v. Lawton*, 1 Pr. Wms. 409, in 1718; *Miller v. Miller*, 3 Pr. Wms. 366, in 1735; 2 Bridg. Index, 229; (Am. ed.) *Wright v. Wright*, 1 Cowen, 598; *Snellgrove v. Bailey*, 3 Atk. 214, in 1744; *Wells v. Tucker*, 3 Binney, 366; Cowen's Treatise, 35; *Canfield v. Monger*, 12 John. 346; *Martin v. Hawks*, 15 John. 405. The gift of a bond *causa mortis*, has been held to be valid. (*Gardener v. Parker*, 3 Mad. R. 184; *Ward v. Turner*, 2

Ves. sen. 442; 2 Kent. Com. 361, 2; 8 Term R. 153.) A note indorsed has been decided to be a proper subject of a gift, *causa mortis*. (2 Bridg. Index, 229, Am. ed.; *Wright v. Wright*, 1 Cowen, 598.) In this case the gift, if not valid as a *donatio causa mortis*, was good as an equitable assignment, having been made in performance of a previous promise of a settlement, in consideration of a marriage engagement. (Rob. on. Frauds, 137, 8.

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R. Bogradus, for defendant:—In gifts *causa mortis*, the donor intends to give the moneys due, and not the mere evidences of debt. The thing intended to be given must be actually delivered. The delivery of the evidences of debt are not sufficient to sustain a *donatio causa mortis*. (2 Kent's Com. 342 and 4.) These gifts are dangerous, and are not to be encouraged. The result of the decisions are, that a chose in action cannot be the subject of a gift *causa mortis*; (*Tate v. Tate*, 2 Ves. jun. 116; *Miller v. Miller*, 3 Pr. Wms. 356; *Antrobus v. Smith*, 12 Ves. 39; *Noyes' R.* 67; *Cottine v. Miller*, 1 Mad. R. 176; *Pearsons v. Pearsons*, 7 John. R. 26; *Fink v. Cox*, 18 John. 145; *Hawkins v. Blewitt*, 2 Espinasse's *R. 663; *Noble v. Smith*, 2 John. 52; *Cooper v. Goodwin*, 1 Swan. 486; *Collins v. Plummer*, 1 Pr. Wms. 104; *Blount v. Burrow*, 1 Ves. jun. 548; *Ward v. Turner*, 2 Ves. sen. 442; *Tate v. Gilbert*, 2 Ves. jun. 111; *Bunn v. Markham*, (7 Taunt. 224.) A gift is not a contract, (2 Kent's Com. 352;) therefore the argument that choses in action are now assignable has no application. Here was only a promise to make a gift, which is not binding. (7 John. 26.) The note was obtained from the testator by undue influence. The gift is therefore void for that reason; (*Morse v. Royal*, 12 Ves. 372; *Parcell v. McNamard*, 14 Ves. 92; *Wright v. Proud*, 13 Ves. 136.) Also, the testator was not possessed of a sound mind and memory at the time he made the gift in question.

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THE CHANCELLOR:—The first question which arises in

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this case is, whether the note of a third person is a proper subject of a gift *causa mortis*. Without taking the trouble to go through all the English cases on the question, whether a chose in action is the proper subject of such a gift, it is sufficient to say it has been decided there, that a promissory note was not a proper subject for such a gift, and that a bond was; [1] (*Miller v. Miller*, 1 Pr. Wms. 353; *Snellgrove v. Bailey*, 3 Atk. 214; *Gardner v. Parker*, 3 Mad. Rep. 184.) In the case of *Wells v. Tucker*, (3 Binney, 366,) the Supreme Court of Pennsylvania held the gift of a bond valid. And in our own state, in the case of *Wright v. Wright*, (1 Cowen, 598,)[2] it was held, that the testator's own note was a valid gift *causa mortis*. [3] Notwithstanding the attempts which have been made in England to distinguish between a promissory note and a bond, in relation to the validity of the gift of a chose in action, there cannot, in reason, be any difference. A gift of either is valid as a symbolical delivery of the debt due on the note or bond, and all the delivery of which the subject is capable.

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In *Wells v. Tucker*, it was also decided that a gift to a third person for the use of the intended donee was a valid gift. The complainant is entitled to the amount due on the note, if it was actually delivered by the intestate to Marsh for her *use, as alleged in the bill, provided Reynolds was of sound disposing mind and memory, and no improper advantage was taken of his situation.

[1] Bond and mortgage will pass by a delivery *donatio causa mortis*. 1 Bligh, 597; *Duffield v. Hicks*, 1 Dow. N. S. 1. As to the requisites of a valid *donatio causa mortis*. See note to *Waller v. Hodge*, 2 Swanston, 106.

[2] This case is overruled. See *Craig v. Craig*, 3 Barb. Ch. 78; see *Harris v. Clark*, 3 Comst. 93. There held that; the executory promise of the donor; i. e., his own draft on a third party, in favor of the donee, intended as a *donatio causa mortis*, is not valid.

[3] In Connecticut, it has been held, that the promissory note of a *third person*, though not payable to bearer, nor so indorsed as to transfer the legal title by delivery merely, may be the subject of a *donatio causa mortis*. *Brown v. Brown*, 18 Conn. 410; see also *Craig v. Craig*, 3 Barb. Ch. 78, 117, 118.

On this question the testimony is not perfectly satisfactory; and claims of this description must always be admitted with the greatest caution. I do not therefore think proper to dispose of this part of the case without giving the parties an opportunity to litigate the question of fact before a jury. I shall direct a feigned issue to be made up between the complainant and the administrators, and tried at the circuit in New York, unless both parties consent to have the trial in the Superior Court of that city, to ascertain whether the testator was of sound and disposing mind and memory, and did freely and voluntarily deliver the note in question to David Marsh, in his last sickness, and in contemplation of death, for the use of the complainant, as a gift to her, to take effect in case of his death; and either party is to be at liberty to examine the defendants Slocum and Marsh as witnesses on the trial of the said issue.

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WEBSTER v. WISE AND FORD.

Pending a treaty of purchase, a third person took a confession of judgment from the vendor, and fraudulently concealed the fact from the vendee until after the sale, for the purpose of enforcing the judgment against the land in his hands. On a bill filed against the judgment creditor and his assignee, they were decreed to release the land from the lien of the judgment.

The assignee of a judgment takes it subject to all the equities which existed against it in the hands of the assignor.

Where the assignee, after notice of the fraud, attempted to enforce the judgment against the land, he was decreed to pay costs to the complainant.

THE complainant purchased from Jonah Phelps a piece of land in Columbia county, for which he afterwards paid the full amount of the purchase-money. While the complainant was in treaty for the purchase, the defendant Wise, a grandson of Phelps, obtained from the latter a judgment bond for \$425, which he caused to be entered up in the

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Supreme Court before the deed upon the sale was executed. He *afterwards assigned the judgment, or part thereof, to the defendant Ford. The latter caused an execution to be taken out and levied on the complainant's land, and the same was afterwards sold and bid in by Ford. No certificate was given by the sheriff on the sale; but about two years afterwards an application was made to the Supreme Court, without any notice to the complainant, and the sheriff was ordered to give a certificate and file a duplicate thereof, *nunc pro tunc*. A short time after such certificate was filed, the sheriff gave a deed in pursuance of the sale; and Ford was proceeding to recover possession of the land, when the bill in this cause was filed for the purpose of obtaining an injunction and to set aside the judgment and sale.

E. Williams, for the complainant.

A. P. Holdridge, for the defendants.

THE CHANCELLOR:—Without going into a detail of all the testimony in this case, it is sufficient to say, it satisfies me beyond all doubt that the judgment against Phelps was fraudulent and void as against the complainant. If the consideration was not wholly fictitious, there is much reason to believe the greater part of the pretended debt was made up for the occasion. That it was the intention of Wise to obtain the judgment, and use it for the purpose of charging the land which the complainant was about to purchase, without letting him know of its existence until the purchase was completed and the consideration paid, is positively proved by the testimony of one witness. This, with the testimony of other witnesses to collateral facts, and the confessions of the defendant, independent of the very strong impression of fraud which the whole transaction bears on its face, is sufficient to discredit the answer of Wise.

Ford, as the assignee of the judgment, is in no better situation than Wise; for it is well settled that the assignee

of a chose in action takes it subject to all equities which existed against it in the hands of the assignor. There must be a decree that the defendants be perpetually enjoined from proceeding against the property of the complainant on that *judgment, or from proceeding at law against him, or any person claiming under him, to recover the possession of the premises. The judgment must be declared void as against the complainant, and the defendant Ford must release and reconvey to him all right and title to the premises acquired under the judgment and execution, and release the same from the lien of the judgment.

If Ford had endeavored in good faith to collect the judgment, or the amount actually advanced by him to Wise, out of the other property of Phelps, I should not think it right to charge him with costs. But as he adopted a different course, and united with Wise in setting up a fraudulent and unjust claim against the lands of the complainant, and has driven him to the expense of this litigation, he must be answerable for the costs of this suit, if it should turn out that Wise is unable to pay the same. The decree must be so framed as to charge the costs against Wise in the first instance; and if they cannot be collected by execution against him, Ford must pay the same, with liberty to prosecute the decree therefor against his co-defendant, in case he shall be obliged to pay the costs to the complainant.

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HAGGERTY AND OTHERS v. DUANE AND FURNISS.

Where the subject of litigation was a fund in the hands of an insolvent assignee, who was a defendant in the cause and had no personal interest therein, but claimed the fund for the benefit of others, the money was ordered to be brought into court, and invested, to abide the further order of the court.

THE defendant Furniss purchased a quantity of goods January 20th.

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at auction of the complainants on the 5th of September, 1828, to be paid for in indorsed notes. The goods were sent home according to the custom on such sales at New York. A few days after the sale, one of the complainants called for the notes, but they were not ready. On Saturday, the 20th of September, he again called and demanded that either the notes should be given or the goods returned, and intimated that if one or the other was not done, he should file a bill in this court to compel it. Furniss did not comply with *this request, and a bill was immediately filed and an injunction issued. In the mean time, and before the subpoena and injunction could be served, Furniss assigned the goods to the defendant Duane, in trust to pay certain alleged confidential creditors; and on Sunday night the goods were removed to Philadelphia and sold, and Duane received the proceeds, which are still in his hands. On the 26th of September, the complainants filed a supplemental bill setting out these facts, and making Duane a party to the suit; and an injunction was granted, restraining him from parting with the proceeds. The answer of Duane admitted the assignment, and that he had no interest therein, except as trustee; that he had sold the goods, and now had in his hands, as the nett amount of the proceeds of such sale, \$596 27; which he held for the sole use of the creditors named in the assignment.

The complainants presented a petition, setting forth the proceedings in the cause, and that on a hearing they would be able to substantiate their rights as set forth in their bill, but that the defendant Furniss was insolvent, and that Duane, since the putting in of his answer, had stopped payment, and was also insolvent; and that they apprehended and believed that before this cause could be brought to a hearing, the funds in his hands would be lost. And they prayed that the fund might be brought into court and invested, to abide the final decision of the cause.

H. Bleecker, for the complainants.

A. Van Vechten, for defendants.

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THE CHANCELLOR:—It is not necessary to go into the merits of the case on this application. The principal on which the complainants claim an equitable lien on the property sold has been frequently recognized by this court, and was recently asserted in the case of *Keeler & Freeman v. Field & others*, (*ante*, 312.) It was also recognized and applied by the Supreme Court of Massachusetts in *Whitwell v. Vincent*, 4 Pickering's Rep. 449.) For the purpose of this motion it is sufficient that the bill and answer show a case on the part of the defendants which is at least liable to strong *suspicion. The money is now lying unproductive in the hands of Duane; it is, therefore, for the interest of whoever may be entitled to this fund, that it should be placed out of danger. If it shall hereafter appear that it belongs to the creditors named in the schedule, they will receive it, together with the interest which may accrue thereon in the meantime. No injury can arise to any person by ordering the money to be paid into court. It clearly ought not to remain under the control of an insolvent assignee. I shall, therefore, direct an order to be entered, requiring the defendant Duane to pay the money to the assistant register within ten days after service of a copy of the order; and that the assistant register put it out at interest on bond and mortgage, or invest it in public stock, to abide the further order of the court.

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RICHARDS v. BARLOW AND OTHERS.

On a reference of exceptions to an answer, if part of the exceptions are allowed by the master, the complainant is entitled to costs on the exceptions allowed, and neither party is entitled to costs as to those which are disallowed.

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If some of the exceptions are disallowed, and none of them are allowed in full, the defendant is entitled to his costs on the reference.

On exceptions to a report, each party is entitled to the costs of the hearing as to the exceptions decided in his favor, which costs are to be off set against each other.

Where the costs of exceptions on each side would be nearly equal, the usual practice of the court is to give no costs to either party.

The subpoena for a better answer may be taken out immediately on filing the master's report, and may be served on the solicitor.

The subpoena for costs must be served on the defendant in person, and the amount of costs, as ascertained on taxation, must be inserted therein.

On taxation of costs, no allowance is to be made for copies of pleadings or proceedings, except where they are actually furnished by order of the court, or in the usual course of practice.

Copies of pleadings of the master are not allowed on a reference of exceptions to an answer, unless in cases of difficulty where copies are required by him, and are actually made for that purpose.

On exceptions to a master's report on exceptions, the solicitor is only entitled to the usual fee for attendance on special motions.

Only one solicitor's and counsel fee can be charged on a reference; and only one fee can be allowed to the master, except by the special order of the court.

On references of exceptions to answer, no objections are taken to the draft of the master's report and copies of such draft for the parties are not taxable.

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*THIS was an application to vacate an order for costs, and an order for an attachment, and for a retaxation. The facts in the case sufficiently appear in the opinion of the court.

H. Bleecker, for the complainant.

W. Stillman, for the defendants.

THE CHANCELLOR :—The defendant applies to set aside the order for costs made in this cause, on the hearing of exceptions to the master's report on the first answer of the defendant, and the costs on the hearing as to the sufficiency of the second answer, on the ground that the Chancellor was misled by a statement of the complainant's counsel as to the particular objections made before the master. From

the affidavits and the certificate of the master, there is no doubt that the statement of the counsel was incorrect in point of fact. But it also appears the objections were made before the master after the complainant's counsel had left the office. There was not therefore any intentional misstatement for the purpose of deceiving the court; and the only question is, whether those objections were material. The original exceptions to the answer are not before me on this motion; but my impression is that I considered the objections made on the argument as unsound, and that they could not be sustained independent of the suggestion that those objections were not made before the master. But certainly this is not the proper method of reviewing the decision on the exceptions. If the defendant's counsel thought the objections tenable, he should have applied for a rehearing.

The defendants also objected to the allowance of costs against Barlow and High, for the proceedings before the master on the reference of the further answer. On the hearing of the exceptions to the master's report, it was in part confirmed and in part overruled. And it was ordered that neither the complainant or the defendants recover costs as against the other on the exceptions to the report; but *nothing was said as to the costs of the proceedings before the master.

On the hearing of exceptions to an answer before the master, if any of the exceptions are allowed, the complainant is entitled to the costs of the reference, so far as relates to those exceptions, and neither party is entitled to costs on the exceptions which are disallowed. If some of the exceptions are allowed only in part, neither party is entitled to costs in relation to those particular exceptions. If some of the exceptions are entirely disallowed, and none of them allowed in full, the defendant is entitled to his costs on the reference. But on exceptions to a master's report, each party is entitled to costs of the exceptions decided in his favor. If some of the exceptions to an answer are well

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taken and others are not, the defendant should submit to answer those which are well taken. In that case only those which are not submitted to will be referred to the master. If the defendant succeeds on those exceptions, he will be entitled to his costs on the reference; and the complainant will be entitled to the costs of the exceptions submitted to, but to no part of the costs of the reference. On exceptions to a master's report, some of which are valid and others not well taken, both parties are compelled to come here to support or oppose the exceptions which are finally decided in their favor respectively. In such cases, if some exceptions are allowed and others disallowed, the costs of the respective parties are off set, and the balance only is to be paid. If the costs on each side will be nearly equal, the court usually refuses to give costs to either party.

The defendant's object to the *ex parte* order for an attachment for not paying the costs of the last hearing before the master, on the ground that it was irregular to take out the subpoena before the master's report was confirmed or had become absolute, and before the costs were taxed. It is also objected that the amount of the costs was not inserted in the subpoena. From the cases cited by the defendants' counsel, it appears that the subpoena for a better answer, and the subpoena for costs, are not the same process, but separate *and distinct proceedings. The first may be taken out immediately upon the filing of the master's report. It may be served on the solicitor or clerk in court, and the defendant must file his exceptions to the report within eight days, or it will become absolute. The subpoena for costs cannot issue until the amount is ascertained by taxation. It must be served on the party personally, unless otherwise specially directed by the court. It is founded upon the taxed bill of costs and the amount as liquidated is set forth in the body and label of the writ. (1 Turner's Ch. R. 362, note; 1 Harrison, 240, 470; Prac. Reg. 406; 1 Fowler's Exc. 446; 2 id. 362; Howard's Eq. Side, 371; Prax. Alm. Cur. Can. 6, 13, 60; Hinde's Pr. 256, 258, 264, 272.) The

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complainant may, at his election, have one subpoena for costs and another for a better answer, or have one subpoena for both. (Prac. Reg. 203, 407.) But if both objects are embraced in the same process, the costs must be first taxed, and the amount thereof inserted in the subpoena; and the service as to the costs must be on the party. The subpoena for costs in this cause, and the order for attachment founded thereon, were irregular, and must be set aside.

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The defendants also ask for a retaxation of the several bills of costs. Upon looking into the bills annexed to the affidavits in this case, I am satisfied they are all taxed much too high. Whether the erroneous items were particularly objected to before the master, does not distinctly appear; but many of them should have been stricken out by him, whether objected to or not. As there must be a retaxation, I shall not attempt to point out the several items; but it may be proper to lay down some general rules, which are applicable to this case, and to all others.

Under the fee bill of February, 1824, the register is entitled to the fees of drawing all common orders, at the rate of 20 cents per folio, and 12 1-2 cents for entering the same. No engrossment is required, and no copies are to be allowed except those which are necessary to be served, according to the usual course of practice.

No copies of pleadings are to be allowed, except such as are required by the ordinary practice of the court, and which *are actually made out and furnished, except in special cases where the Chancellor directs copies to be made and furnished for a particular purpose. But one solicitor's or counsel fee is to be allowed on arguing exceptions before a master, although the reference continues more than one day; and the master is only entitled to one fee for the hearing. If he claims pay for extra services in any case beyond the amount mentioned in the fee bill, the allowance can only be obtained on a special application to the court.

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On a reference of exceptions to an answer, no objections are taken to the draft of the master's report, and no copies of

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such draft are to be allowed, except the engrossed copy which is prepared by the master to file. A copy of the exceptions for the master on the hearing is to be allowed, but no copies of other pleadings, except in cases of great difficulty, when they are actually made for that occasion, and furnished in pursuance of an express direction of the master. In all other cases, the drafts or copies belonging to the solicitors are to be produced before the master, and left with him as long as may be necessary. When the same copies are used on different occasions before the court, the solicitor is only entitled to pay for them once.

Exceptions to a report on exceptions to an answer being now brought on and heard as a special motion, the solicitor is only allowed the ordinary fee on special motions; but \$5 is to be allowed to counsel on the argument agreeably to the fee bill. The party excepting to a report furnishes the necessary copies for the hearing; and they are not to be allowed to the adverse party unless furnished at the request of the party excepting. If both parties except to the report, the complainant is to furnish the necessary copies, except copies of the exceptions, of which each party furnishes copies of his own; and all the exceptions are heard together.

There must be a retaxation of the several bills of costs in this case. And if any thing has been overpaid, it must be refunded to the party entitled to the same.

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*This cause afterwards came up again before the Chancellor, on a motion for another retaxation of the costs; on which occasion the Chancellor gave further directions as to the taxation, which are contained in the following opinion:

THE CHANCELLOR:—On the former application for a retaxation of the costs in this cause, the court did not attempt to decide on the objectionable items, but stated general principles by which the master was to be governed in the taxation. So far as those principles extended, the master

has conformed to them in this taxation; but new questions having arisen, it becomes necessary to give further directions as to the taxation of these costs.

The first objection is, that the master has allowed the solicitor to charge several copies of the common order of reference of exceptions served on the solicitors for the defendants. The service of these copies was wholly unnecessary. The exceptions had been served, and the master's summons was all the notice requisite to apprise the defendants that the order of reference was entered. Neither was it necessary to serve copies of the master's report. After it was filed, either party was at liberty to apply to the register for a copy, if he wished it; and if the defendants wanted no copies, they ought not to be compelled to pay for those which the adverse party unnecessarily served on them. By the subpoena for a better answer, they were informed that the report was filed, and that it was against them, and they were bound at their peril to take notice of its contents.

Another objection is, that the summons was served on the different solicitors by different persons, and that several affidavits of the service are charged, when only one was necessary. If this mode of service was adopted unnecessarily, and for the purpose of swelling the costs, only one affidavit should have been taxed; but it appears that several affidavits were actually made, and the master has decided they were necessary and proper. This was a matter resting in the sound discretion of the master, and I have not sufficient before me to say his decision in this respect was wrong.

The only remaining objection relates to the prospective costs. Where the party is obliged to serve a copy of the *taxed bill to compel payment, he has a right to tax it prospectively, together with the charge for the demand. But as the statute prohibits any allowance for prospective costs, if payment is made before these services are actually performed, they must be deducted by the solicitor. If the party proceeds by subpoena, the amount is inserted therein, and no service of the taxed bill is necessary. The party

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cannot, therefore, be allowed for both. The affidavit of service and demand cannot be taken prospectively, as it is to be presumed the costs will be paid agreeably to the order of the court. If any further proceedings are necessary, the costs thereof and of the affidavits on which they are founded will be provided for by the subsequent order of the court.

The bills must be retaxed on these principles, and neither party is to have costs on this application.

HEATH v. HAND AND OTHERS.

Where a judgment is given by the principal debtor to his indorsers to secure the payment of the debt for which they are responsible, and they become insolvent, the creditor is entitled to the benefit of the security.

The judgment being given for a specific object, an assignee cannot hold it against the creditors who have a prior equity.

Where the sheriff had levied on perishable property, and the execution was stayed by injunction, the Chancellor allowed him to sell the property and pay the proceeds to the register, to abide the further order of the court.

January 20th.

IN October, 1826, the complainant, being possessed of a considerable real estate, gave the defendants, Hand and Kenyon, a judgment bond, in the penal sum of \$10,000, conditioned to pay \$5,000, on which a judgment was forthwith entered in the Supreme Court. The object of that judgment was to secure them for advances and responsibilities which they had incurred, or might thereafter incur for the complainant. Hand and Kenyon afterwards continued to make advances and to accept the drafts of the complainant until July, 1828, when Hand called on the complainant, in company with one of the creditors, who held drafts of the complainant, which had been accepted by Hand and Kenyon, and *stated that they had stopped payment, and were unable to meet the drafts, but would be

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able to pay them if complainant would give them a judgment to the extent of their claim, including the acceptances and responsibilities incurred by them on account of the complainant. Hand at the same time presented him with a statement from their books, from which it appeared that the whole amount claimed by them, including indorsements and acceptances, was \$14,800, and agreed that if complainant would give them a judgment for the balance of that amount over and above the first judgment, they would be able to go on with their business; and that if, on investigation of the account, it should turn out that so much was not due, the errors should be corrected. A judgment was given accordingly, on a bond conditioned to pay \$9,800 on demand with interest. Hand and Kenyon assigned this last judgment to the defendant Lightbody, to secure him for responsibilities which he had incurred for them. The amount of the indorsements and acceptances included in the judgment have not been paid by Hand and Kenyon, or any other person, but Lightbody has secured the payment of some part thereof. An execution having been issued on this judgment for the whole amount thereof, and levied on the complainant's property, he filed his bill and obtained an injunction. The defendants moved to dissolve the injunction on the bill and answer, or that the same might be modified so as to enable the sheriff to sell the personal property which was perishable.

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I. Hamilton and M. T. Reynolds, for the defendants.

J. L. Wendell, for complainant.

THE CHANCELLOR:—It appears from the bill and answer in this cause, that the acceptances and responsibilities which Hand and Kenyon had not paid, were included in and intended to be secured by the judgment for \$9,800. It is therefore immaterial whether there was any express agreement to pay them or not. To that extent the holders

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 Bradhurst and Kenyon have an equitable interest in the judgment,
 v. *Bank of Auburn v. *Throop*, 18 John. 405,) which, being
 Bradhurst. prior to the assignment to Lightbody, must prevail, except
 so far as he stands in the same situation with those creditors. The assignee of a judgment or other chose in action takes it subject to all the equities which existed against it in the hands of the original holders.

Hand and Kenyon being irresponsible, the complainant has a right to require that he be discharged from the payment of those drafts and notes before the proceeds of his property can be applied to any other purpose. The judgment being given to secure the payment of particular debts and responsibilities, Hand and Kenyon have no right to divert it to other purposes without the consent of the complainant. There is undoubtedly a considerable indebtedness from the complainant secured by this judgment, and it might be necessary, for the purpose of obtaining full security, to take out the execution and levy on his personal property, even before the acceptances and indorsements were paid. Under such circumstances it would be improper to let that property remain and perish in the hands of the sheriff. The injunction must therefore be modified, so far as to permit the sheriff to sell the personal property on the execution, and deposit the proceeds thereof with the register of this court, to abide the further order thereof.

BRADHURST AND OTHERS, EXECUTORS, &c. v. BRADHURST
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Where an annuity is given by will to a man and his heirs in perpetuity, he acquires an absolute interest therein, and becomes entitled to the complete disposition of the fund set aside to produce the annuity.

If the annuity be given to a man and the heirs of his body, it is in the nature

of an estate tail; and to prevent a perpetuity, the common law gives him an absolute interest in the annuity.

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The rule is the same as to annuities given by a will, whether payable out of real or personal estate.

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Where there is a limitation over of an annuity upon the failure of issue, at the death of the annuitant, the limitation over is good, being in the nature of an executory devise.

*Where the testator gave his real and personal estate to executors in trust, to and for the uses mentioned in the will, and then directed them to pay certain annuities to his wife and children during life, and the income of the estate was insufficient to pay all the annuities, it was held, that the executors were authorized to sell such part of the estate as would be necessary to raise a sufficient sum to purchase the annuities given in the will.

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THIS was a bill filed by executors against the devisees January 20th. and legatees to settle the construction of the will, and of the various bequests contained therein. In September, 1825, the testator drew his own will, and executed the same in due form of law to pass real estate, and thereby appointed the complainants guardians and executors of his will, and then devised and disposed of his property as follows: "*Imprimis*: I do give and bequeath unto these my aforesaid executors and guardians, in trust to and for the uses and purposes hereinafter mentioned, all my real and personal estate, and order and direct them to pay after the time of my decease unto my beloved wife, Mrs. Mary Bradhurst, the annual sum of \$1,200, in half yearly payments; and she my said wife will and may occupy my dwelling house, No. 206 Broadway, so long as it will be agreeable for herself so to do, with her two daughters: otherwise my will is, and I do leave the said dwelling house to the direction and discretion of my said executors and guardians, to sell and dispose of the same. During the time it is kept, the ground rent, taxes, assessments and necessary repairs, are to be paid out of my estates. And I do give unto my said wife all my household furniture and plate, &c., of every description, and all such books as she will wish to retain, excepting my medical books; these I request to be given to the first of my grand-sons who will study physic as a profession.

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"Item: I do will and direct my said executors and guardians to pay the annual sum of \$1,000, viz., \$500 to be paid to each of my said two daughters, to Mrs. Maria T. Scheffelin and to Mrs. Catharine Ann McKesson \$500 annually in half yearly payments: these sums to be paid into the hands of each of them, and to give, at the time of receiving, their own personal and individual receipts for the same. My intention is, that neither of them shall, by any act of theirs, alienate or convey the said annual allowance or their interest to any person or persons, for any time, without forever forfeiting *their claim to any part of my estate or interest therein. The annuity is intended for their use alone, notwithstanding coverture.

"And further, my express will and desire is, and I do direct that at the death or decease of my said wife, their mother, that the full amount of the annuity she, my said wife, did receive for and during the term of her life, be divided into three parts, the one third part thereof to each of my two daughters, and the remaining third part to my grand-daughter, Mary Theresa Scheffelin, to be paid for and during the term of each of their natural lives; and it will be so understood that this addition or sum being added to the foregoing annuity is to be considered as under the like and the same restrictions as the above annuity or bequest to my said two daughters. These sums, when added together, will make to each of my daughters \$900, and to my said grand-daughter \$800 annuities. And I do desire and direct that from and after my death and decease, the further sum of \$400 per annum will commence and be added to the annuity of my said grand-daughter, Mary Theresa Scheffelin, making together \$700 per annum during her life; and that at the time of her death, if she leaves issue, then the above annuity is to go to her female heirs, in preference to males; but in case if she should die before, or leave no issue, then my will and desire is, that the said annuity go to and among all my grand-daughters, to share equal and alike, viz., of my son and daughters.

"Item: I do order and direct my aforesaid executors and guardians to this my will and testament to allow and give unto each and all of my grand-daughters, both of my son, John M. Bradhurst, and of my daughter, Maria T. Scheiffelin, the annual sum of \$200 to each, in half yearly payments, for and during the time or term of their lives; and if it should so happen that either of them should die without leaving issue, then the said annuity, part or portion of her so dying is to be divided amongst the survivors of them then living, or their heirs, female in preference.

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*"And it will be so considered and understood, that these annuities are, and will be under the same and the like restrictions as those of their aunts and sister Mary Theresa.

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"Item: It is to be understood, and I do order and direct that if at any time hereafter, there should be a deficiency of money in hand to pay the whole at once, the first annuities will have the priority in point of payment, and so in order in point of payment."

The testator then made several specific legacies, and afterwards concluded as follows: "Item: After the several annuities in this my will and testament, I do direct that all the remainder of my said real and personal estate, and likewise the above mentioned several annuities as above directed, viz.: to my wife, my two daughters and grand-daughters, at the death of either of them, all such sums of money as will come into their possession, I do direct to be for the sole benefit of all and each of my grand-sons living at the time of my death, both of my son and daughters, to share equal and alike to and amongst them as they will arrive at the age of twenty-two years, together with the interest arising from the same by the purchase of stock or bonds and mortgages, and the same to be paid them, or either of them, in whole or part thereof, at the direction and discretion of my said executors and guardians, as they may at the time, or will think proper, as any one of my grand-sons manifest and show a disposition and ability to engage or enter on some regular business or employment to ob-

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tain a permanent livelihood, and not otherwise on any condition."

The testator died in March, 1826; and by a memorandum enclosed in the envelope with his will, and dated September, 1825, his real and personal property was estimated at \$64,900, besides debts; to which was added, "the interest of this amount at 6 per cent:

\$3,894	Mrs. B.	\$1,200
2,900	2 Drs.	1,000
—	Theresa	300
\$994	2 Gr. Drs.	400
		<hr/> \$2,900."

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*By another memorandum in the handwriting of the testator, indorsed, "Samuel Bradhurst's will, division of property," and found enclosed in the same envelope, it appeared that the testator had made an estimate upon the basis of an income of 6 per cent. on the value of his property, by which, during the life of his wife, annuities could be paid out of the same as follows: \$1,200 to his wife, \$500 to each of his two daughters, \$300 to his grand-daughter Mary Theresa, \$200 each to his two grand-daughters, and \$90 to each of his nine grand-sons. That after the death of his wife, by dividing her annuity equally between his two daughters and the grand-daughter Mary Theresa, the legacies to the former would be increased to \$900 each, and of the latter to \$700. And that on the death of each of his daughters, the annual income of his respective grand-sons would be increased \$100, making the annual interest to each grand-son, after the death of both daughters, \$290.

The wife elected to continue in the occupation of the house in Broadway. The annual income of the property is but little more than sufficient to pay the annuities to the widow and two daughters; a part of the property being wholly unproductive.

The bill was taken *pro confesso* against the daughters. The widow put in her answer, relinquishing all claim to

dower; but claimed to have the annuity secured to her for life, together with the other provisions made for her by the will.

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The grand-daughter Mary Theresa, by her answer, insisted that she was entitled to an annuity of \$400, from the death of the testator, with an addition of \$400 thereto after the death of her grand-mother; and that she was also entitled to an additional annuity of \$200, from the testator's death, under the clause in the will which gives such annuities to the several grand-daughters. She also claimed to have her annuities paid out of the principal of the estate, if the income is not sufficient. The other grand-children being infants, put in their answers by guardian, submitting their rights to the protection of the court. Other questions presented by the pleadings for the decision of the court, were, whether the limitation over of the annuities given to Mary Theresa and *the other two grand-daughters, to their heirs female, was not void, as being too remote; whether the executors are authorized to sell the real estate for the purposes of the will, and what is the true construction of that clause of the will which directs, that if there should not be sufficient money in hand to pay the whole annuities at once, the first shall have the priority in payment.

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W. T. McCoun for the complainants:—The testator intended to give his grand-daughter, Mary Theresa, an annuity of only \$300 during the life of her grand-mother; and on the decease of the grand-mother, the further sum of \$400 per annum, making in the whole \$700. The latter expressions contained in the will show that this is the fair construction of it. Where two parts of a will are irreconcilable with each other, the rule of construction is that the latter shall prevail and overrule the former. (*Sims v. Doughty*, 5 Ves. 243; *Constantine v. Constantine*, 6 Ves. 100; 4 Mad. R. 82.) Words in a will may be transposed, where the whole context would be thereby rendered more consistent with the facts and the testator's intention.

1829. (*Marshall v. Hopkins*, 15 East, 309 ; *Doe ex dem. Wolfe v. Allcock*, 1 Bar. & Ald. 137 ; 8 Petersdorf's Ab. tit. *Devise*, p. 143, 145, 147.)
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 Bradhurst.

Mary Theresa is not entitled by the terms of the will to the further annuity of \$200. It cannot be supposed the testator intended to give her so much more than he did the other grand-daughters, or even the daughters themselves.

The income of the estate being insufficient to pay the annuities, the question arises whether the capital of the estate can be resorted to, to make up the deficiency. This cannot be done, unless the will clearly and unequivocally expresses that such was the intention of the testator. The power to resort to the capital of the estate cannot be implied. The first clause of the will devises all the estate, real and personal, to the executors, upon trust for the uses and purposes thereafter mentioned, but without any words of limitation.

[*337] It may perhaps be considered that they take a fee by implication. In *Shaw v. Weigh*, (Fitzg. 7 ; S. C., 2 Strange, 798,) *where there was a devise to three trustees and the survivor and survivors of them, without any words of limitation annexed to their estate, but given to them "upon the trusts hereinafter mentioned," it was held they took a fee, because, otherwise the estate would not be sufficient to answer the trusts ; and so all such subsequent trusts would be void. And the court say, "they take a fee simple by implication ; for the intent of the testator plainly appears that they should take an estate sufficient to answer and satisfy all the trusts of the will, which must be an estate of inheritance."

But where the purposes of a trust may be satisfied by giving the trustees a less estate than a fee, no greater estate shall arise to them by implication ; (*Doe ex dem. White v. Simpson*, 5 East, 162 ; S. C., 1 Smith's Rep. 383 ;) the general rule being that trustees take exactly that quantity of interest which the purposes of the trust require. (*Haw-*

ker v. Hawker, 3 Barn. & Ald. 537; *Murthwaite v. Barnard*, 2 Brod. & Bing. 623; *Water v. Hutchinson*, 5 Moore, 143; S. C., 2 Brod. & Bing. 349, affirmed in 1 Barn. & Cres. 721, and 3 Dow & Ry. 58.)

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Under this will the purposes of the trust are to pay to the testator's wife, his two daughters and the grand-daughters, their several annuities, with the remainder of his real and personal estate, to all and each of his grand-sons, living at the time of his death, to be divided amongst them as they arrive at the age of 22; the same to be invested in stock or on bond and mortgage, and to be paid to them in whole or in part, at the discretion of the executors, &c.

If, for these purposes, a fee to the trustees or executors be necessary, then they have it; otherwise not.

But perhaps it is not very important to the present question how or which way this matter is considered. The question is whether the bulk of the estate is to be broken into for the purpose of paying the annuities and the arrears that are due, when the interest and income are not sufficient for the purpose.

The will is not explicit on the subject; it merely directs, if at any time hereafter there should be a deficiency of *money in hand to pay the whole at once, the first annuities will have the priority in point of payment, &c.

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The court is therefore left to form its own conclusions whether the testator meant that any thing more than the income of his estate should be applied to discharge the annuities, and if not sufficient for the whole, then, whether he intended they should be paid *pro tanto*, or how otherwise.

It is to be observed, that the objects of the testator's bounty (with the exception, perhaps, of his wife) do not stand in absolute need of those yearly sums for their support and maintenance, or for their advancement in life. His two daughters have husbands who are bound to provide for them, and his grand-daughters have parents equally bound, and of ability also to afford them support. It is therefore a case where the court will not feel itself bound from ne-

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cessity, (as it sometimes does in the case of infants, where their property is small and their parents poor,) to break in upon the principal in order to afford them a maintenance, as in the case of *Colles v. Blackburn*, (9 Ves. 940,) and *Ex parte Green*, (1 Jac. & Walker, 253.) But it is presumed the court will from analogy in principle, adopt the rule established in the following cases:

In *Parker v. Parker*, (Freem. 58, the Lord Chancellor would not extend maintenance beyond the interest of the money, because, if he should, it would sink the principal to the detriment of those in remainder.

In *Swinnock v. Grisp*, (Freem. 78,) the court would not allow any thing out of the principal towards maintenance, but only the interest.

In *Walker v. Wetherell*, 8 Ves. 474,) the M. R. says, the rule has never been to permit trustees, of their own authority, to break in upon the capital. The court very rarely has broken in upon the capital for the mere purpose of maintenance, though frequently for advancement.

In *Beasley v. Magrath*, (2 Sch. & Lef. 85,) Lord Redesdale says, maintenance for a child can be charged only out of the interest of its fortune. The like was ruled in *Ex parte McKay*, (1 Ball & B. 405.)

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*But if the capital of the estate is not to be applied to the payment of the annuities, and there should continue to be a deficiency from the income, then the question remains to be settled, whether the annuities are to be paid *pro tanto*, and all to abate in proportion, or whether the first named are first to be paid.

The general rule as to legacies, in case of a deficiency of assets, is, that all the legacies must abate. (Preston on Legacies, 358.) Priority may however be expressly given. (Id. *Preston v. Booth*, 4 Mad. 161, 168, per Vice-Chancellor.)

In this case it clearly appears from the will, that the testator intended, in case of a deficiency, to give his wife and daughters the preference and a priority of payment to the full amount of their annuities.

The memoranda left by the testator show, that the testator did not intend the capital of the estate should be applied to the payment of the annuities. These memorandums are admissible in evidence. Parol or extrinsic evidence has been received to prove the state of a testator's property; to show what he meant to dispose of; to rebut equities grounded on presumption; to support presumptions, and to oust an implication; (*Fonnereau v. Poyntz*, 1 Bro. Ch. Cas. 472, 480; *Pole v. Lord Somers*, 6 Ves. 309, 827; *Druce v. Dennison*, 6 Ves. 885; *Stephenson v. Heathcote*, 1 Eden's Rep. 37, 2d ed. and notes; *Colpoys v. Colpoys*, 1 Jacob's R. 451.) In this case the memorandums are admissible to show the amount of the testator's property; the supposed income from it; and that he meant to dispose of the income merely in annuities; and the manner in which he intended it to be distributed. The limitation over of the annuities given to Mary Theresa Scheiffelin, (now Mrs. Clark,) "if she leaves issue, to her female heirs in preference to males," and of the annuities to the other grand-daughters, "to their heirs female in preference," are void, the contingency upon which they were to take effect being too remote. The limitation of the annuities to the survivor or survivors of the annuitants are undoubtedly good; (*Robinson v. Fitzherbert*, 2 Bro. Ch. Cas. 127; *Jeffery v. Sprigge*, 1 Cox, 62; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 488; *Massey v. Hudson*, 2 Meriv. 180; *Ross v. *Ross*, 1 Jac. & Walker, 154; *Salkeld v. Vernon*, 1 Eden's R. 64; *Gray v. Shawne*, 1 Eden's R. 158; *Taylor v. Clarke*, 2 Eden's R. 202; *Destouches v. Walker*, 2 Eden's R. 260; *Badens v. Lord Galway*, 2 Eden's R. 297.) It cannot be denied that an annuity may be granted in fee, and descendible to heirs according to the usual course of descents; (*Earl of Stafford v. Buckley*, 2 Ves. sen. 170; *Turner v. Turner*, 1 Bro. C. C. 815; *Smith v. Pybus*, 9 Ves. 566; *Pollexfen's R.* from page 24 to p. 44.)

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J. I. Roosevelt, for the adult defendants:—The memoran-

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dums cannot be admitted to explain the will. It does not appear when they were written; if before the will was made, then they are merged in the will: if at the same time, then, to have any effect, they should have been referred to in the will, or on their face should have been so certain as to constitute a testamentary disposition of themselves; and, in that case, to render them available, they should have been proved before the surrogate. Another objection to these memorandums is, that the annuities are a charge as well upon the real as the personal estate; and any testamentary disposition therefore in relation to them, to be valid, must have been executed in the presence of at least three witnesses. If the memorandums were written after the will, by way of an explanatory codicil, they are equally void for uncertainty and for want of execution. The testator clearly intended to give Mary Theresa, now Mrs. Clark, an annuity in the whole of \$800; notwithstanding he calls it himself \$700. The testator gives her two distinct annuities; the one a third of \$1,200, and the other \$400. The principle is, that the elements of a calculation must control the result of a calculation; or, in other words, that which is more certain must control what is less certain. Mrs. Clark is also entitled under the will; in addition to the annuities already mentioned, to an annuity of \$200. The priority spoken of in the will, in the payment of the annuities in case of a deficiency of money on hand, applies only to the case of a temporary inconvenience as to the time of payment, and not to the payment itself; and if a permanent abatement becomes necessary, it must, according to the general rule, be made *pro rata*.

[*841] *The particular legatees are entitled, as between them and the residuary legatees, to have their annuities paid out of the capital of the estate, the income of the same being insufficient for that purpose. These annuitants were the special objects of the testator's bounty, and it is only after the several annuities that he directs all the remainder of the estate to be for the benefit of his grandsons; and this re-

mainder, moreover, he describes as something to be paid to them, thereby showing clearly that it was his intention that his whole estate should be converted into cash. It was with this view, no doubt, that the testator devised his whole estate to his executors in trust. As to the supposition that they only take a life interest, it is susceptible of several answers. First, the certain fulfilment of the trust requires a greater estate, inasmuch as the annuitants, for whose lives at least provision is made, may outlive the executors; and what is still more decisive, part of the annuities are in fee. Hence it would follow that the executors would take a fee by necessary implication. Secondly, although no words of inheritance are used in the devise, it is perfectly well settled that the words "all my estate," which are used, have the same operation. (*Livingston v. Delancey*, 13 John. 537; *Jackson v. Merrill*, 6 John. 185.)

The next question is, what is the nature of the annuities to Mrs. Clark and the other two grand-daughters? Are they for life with remainder over in tail? or are they estates tail, converted by operation of law into estates in fee simple? or are they fees conditional at common law, converted by the birth of issue into fees absolute? As to the two first annuities given to Mrs. Clark, they are by the will declared to be "during her life, and at the time of her death, if she leaves issue, then to go to her female heirs in preference to males; but in case she should die before, or leave no issue, then to go to and among all the testator's grand-daughters." From this language, it is apparent that the testator intended the provision in question to be continued to Mrs. Clark and her descendants so long as she should have any. From which position two consequences follow: First, that the limitation *over of the grand-daughters being dependent on an indefinite failure of issue, is void for remoteness; and secondly, that the estate granted to Mrs. Clark is either an estate for life with remainder to her issue in fee, or which is more consonant with the spirit of the authorities, an estate tail in Mrs. Clark by implication,

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converted either by the operation of our statute, or by the birth of issue at common law, into a fee simple absolute. (*Earl of Stafford, v. Buckley*, 2 Ves. sen. 170; Co. Lit. 144, b.) An annuity, like the rent of land, may be granted in fee as well as for life or years; and whether it be within the statute *de donis*, and therefore subject to the doctrine of entails, or within the principle of fees conditional at common law, as adjudged in *Nevil's case*, the result in the present instance will be precisely the same. (7 Co. 33.) "It is admitted," says the Master of the Rolls, in the case of *Smith v. Pybus*, 9 Ves, 574,) cited by the counsel for the complainants, "that an annuity to a man and his heirs would constitute a perpetual annuity; and the only way of satisfying it is by setting aside such a sum as would forever answer it; and the annuitant would have the absolute disposition of the sum so set aside." The annuities of two hundred dollars, each given to the grand-daughters as such, are declared to be "for and during the term or terms of their lives; and if it should so happen that either of them should die without leaving issue, then that the said annuity, part or portion of her so dying, is to be divided amongst the survivors of them then living, or other heirs, female in preference," with a limitation over in favor of the residuary legatees. The cross-remainders in this case, as well as the limitation over, being equally dependent on an indefinite failure of heirs, are clearly void as too remote; and, upon the principle of the great *Eden case*, each of the grand-daughters takes an estate tail turned by law into a fee simple. (*Wilkes v. Lyon*, 2 Cowen, 838; *King v. Melling*, 1 Vent. 225; 2 Lev. 58; 1 Bulst. 219; *Wild's case*, 6 Co. 17; *Shelby's case*, 1 Co. 99; *Richards v. Lady Bergavenny*, M. 1695; 2 Vern. 825; *White v. Collins*, Com. R. 289; *Sparrow v. Shaw*, 3 Bro. P. C. 467; *Jackson ex dem. Herkimer v. Bellinger*, 18 John. 868.) Personal estate cannot be entailed. *Where personal estate is bequeathed in a will by words which in case of real estate would have created an estate tail, the absolute property passes to the lega-

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tee. (*Seale v. Seale*, 1 P. Wms. 290; Prec. in Chanc. 421; Gil. Eq. R. 105; *Butterfield v. Butterfield*, 1 Ves. 133, 154; *Stratton v. Payne*, 3 Bro. P. C. 257; *Earl of Chatham v. Tothill*, 6 Bro. P. C. 450; *Pelham v. Gregory*, 5 Bro. P. C. 485; *Duke of Montague v. Lord Beaulieu*, 6 Bro. P. C. 225.)

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W. Van Hook, for Bradhurst's infants.

B. Ferris, for Scheiffelin's infants.

THE CHANCELLOR:—I am satisfied from the will itself, without reference to the memorandums found therewith, that the intention of the testator was, to give to his granddaughter Mary Theresa an annuity of \$300 only, during the life of her grand-mother; and on her decease to add to it one-third of the legacy given to the latter, thereby increasing it to \$700.

The proper rule of construction in the case of wills, is to give effect to the intention of the testator, if such intention can be discovered from the whole will taken together, and the same is not inconsistent with the rules of law. (*Wyatt v. Sadler's heirs*, 1 Munf. 537.) And where such intent is plainly discoverable, the court, in order to give effect thereto, frequently rejects the strict grammatical sense of the language employed by the testator.

The first annuity of \$300 to Mary Theresa, was undoubtedly the one intended to commence from his death. And in the subsequent clause, in which he directs, "that from and after my death and decease, the further sum of \$400 per annum will commence and be added thereto," the testator has evidently substituted his own death for that of his wife; for he had before declared, that after the death of his wife, the \$1,200 should be equally divided between Mary Theresa and her two aunts. And this is undoubtedly the same \$400 which he directs to be "added to her annuity;" for he then goes on further and says, "making together \$700 per annum, during her life." If he had intended the

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\$400 as the annuity *to commence at his death, he would not have directed it, at that time, to be added to the annuity which was to commence afterwards. He could not have intended to give two \$400 legacies, one commencing at his own death, and the other on the death of his wife, because one of them is mentioned as \$300 only. And both, when added together, are by him declared to amount to \$700. By the grammatical construction of the language used by the testator, the \$300 annuity is not described as the third part of the annuity of the grand-mother, which he directs to be divided on her death. This part of the will is certainly very obscure, but I think sufficient appears to show the testator's intent without looking beyond it. If it will not bear this construction, and the written memorandums of the testator cannot be resorted to for the purpose of explaining his intention, the court might be compelled to reject the whole of the annuities to Mary Theresa, as being void for uncertainty.

There is no ground for the claim put in by Mary Theresa for an additional legacy of \$200, from the death of the testator, under that clause of the will which gives such legacies to each and all of his grand-daughters. Although the general description of the legatees would include her also, yet it is evident he did not intend her as one of them; because in the next clause he directs that those legatees should take their annuities, subject to the same restrictions as those which were imposed in relation to the legacies given to "their aunts and sister Mary Theresa."

The next question is as to the limitations over of the annuities to Mary Theresa and the grand-daughters, which must be understood to mean those in existence at the death of the testator. And here it may be proper to observe that this will is so obscurely and inartificially drawn, that it is impossible to ascertain, with any degree of certainty, what was the real intention of the testator. The several bequests must therefore be construed according to the legal effect of the terms employed. It appears to have been the

general object of the testator to make personal property unalienable. That not being allowable, the construction of some parts of the will must, of course, be contrary to his intention. Annuities *given by will, although payable out of the personal estate, or out of the general funds of the testator, are generally construed and governed by the principles which are applicable to a devise of real estate. Thus, if an annuity is given to a man and his heirs in perpetuity, he has an absolute interest therein; and the only way of satisfying it is by setting aside such sum as will forever answer it; and the annuitant is entitled to the absolute disposition of the fund so set aside. (*Smith v. Pybus*, 9 Ves. 567. (If it is given to a man and the heirs of his body, it is in the nature of estate tail; but the annuity cannot be barred by a common recovery as a real estate can. (Doct. & Stud. Dial. 1, ch. 30; and per Lord Loughborough, 1 Brown's Ch. Rep. 319.) Therefore, to prevent a perpetuity, the common law gives to the annuitant an absolute interest; and the effect is precisely the same as that produced by our statute abolishing entails upon a devise of real property in tail. Upon the same principles, a limitation over of the annuity upon an indefinite failure of issue is void, as depending upon too remote a contingency. (*Seale v. Seale*, Prec. in Ch. 421; 1 P. Wms. 290, S. C.; *Bodens v. Watson*, Amb. 398, 478; *Robinson v. Fitzherbert*, 2 Bro. Ch. Rep. 127.) But if the failure of issue is confined to the death of the annuitant, the limitation over is good, as being in the nature of an executory devise. (*Shepherd v. Lessingham*, Amb. 122; 13 Ves. 484; 6 Bro. P. C. 318.)

The limitation over of the annuity to Mary Theresa is not upon an indefinite failure of issue, but upon the contingency of her dying without issue living at the time of her death. Therefore, upon the principle of the case of *Wilkes v. Lyon*, (2 Cowen, 338,) she is entitled to the same in perpetuity; subject, however, to the contingency of her dying before the other grand-daughters, and without issue living at the time of her death. And she is not entitled to the

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absolute control of the fund set apart for the purpose of raising that annuity, until it is ascertained that the limitation over cannot take place. The \$200 annuities to the other grand-daughters are also in perpetuity, but the whole goes to the survivor, if either dies in the life time of the other without *issue living at the time of her death. The true construction of the will is, that the executors take the whole estate, with power to sell the same for the purpose of the will; subject, however, to his restriction, that the widow is entitled to the possession of the dwelling house in Broadway during her natural life, or so long as she thinks proper to reside there. The specific legacies must first be satisfied, and a sufficient sum appropriated to pay the ground rent, taxes, assessments and necessary repairs of the house and lot in Broadway. If there is not sufficient property to raise and pay all the annuities, the clause of priority in the will requires the \$1,200 annuity to the widow, with its several remainders over, to be first provided for; then the two \$500 annuities to the daughters, and after that the \$300 annuity to Mary Theresa. The \$200 legacies to the other grand-daughters must be postponed to all these; and if there is any abatement, it must be in the several classes only. A sufficient sum must therefore be appropriated to purchase an annuity of \$400 during the joint lives of the widow and Mrs. Scheffelin, and a like annuity during the joint lives of the widow and of Mrs. McKesson; and another annuity of \$400 in perpetuity. The whole of these annuities must be paid to the widow for life; and after her decease, the first annuity must be paid to Mrs. Scheffelin, the second to Mrs. McKesson, and the third to Mary Theresa, during their respective lives; and after the death of Mary Theresa, if she shall survive the other grand-daughters and leave issue, the latter annuity, or the fund set apart for the payment thereof, must be transferred to her legal representatives; but if she dies before the other grand-daughters, or either of them, and without issue, then it is to go to those grand-daughters, or such of them as are then living,

in perpetuity. After providing for those annuities, another sum must then be appropriated to purchase two annuities of \$500 each, one for the life of Mrs. Scheffelin, and the other for the life of her sister, and to be paid to them respectively according to the directions of the will. A further sum must then be set apart to purchase an annuity of \$300 in perpetuity, to be paid to Mary Theresa for life, including arrears from the death of the testator, and to be disposed of after her *death in the same manner that the \$400 annuity in perpetuity is herein directed to be disposed of; and out of the residue of the estate a further sum must then be appropriated, sufficient to purchase two perpetual annuities of \$200 each, for the other grand-daughters of the testator, to be paid to them respectively, or to accumulate for their benefit from the death of the testator during their natural lives. And if either of them die during the lifetime of the other without leaving issue then living, the whole to go to the survivor in perpetuity; but if either dies without issue during the life of the other, their respective annuities, on the death of each, are to go to their legal representatives in perpetuity. After providing for these several annuities, the residue of the property must be appropriated for the use of the grand-sons who were in existence at the death of the testator, or their legal representatives, in the manner mentioned in the will.

A decree must therefore be entered, declaring the construction of the will as above stated, and directing the executors to appropriate the real and personal property of the testator to raise and pay the annuities and legacies according to this construction. They are also to have their costs of this suit out of the estate.

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A testamentary paper, purporting to be a will of real and personal estate, was prepared by the testator, in his own handwriting, with an attestation clause and leaving blanks for the date, and upon his death, twenty-seven years afterwards, it was found among his valuable papers in this state, without subscribing witnesses, date or signature; held, that it was an unexecuted and unfinished instrument, and was not a valid will of personal estate.

Where, from an inspection of a testamentary paper, or otherwise, it appears that the deceased intended the same to operate as his will, without any further act on his part, and without the addition of any other formalities, it is a valid will of personal property.

But if some other act or formality was supposed necessary by the testator, or was intended to be done and observed by him, it is an unfinished or unexecuted *will, and is not valid unless the testator was arrested by death before he had reasonable time to complete his will in the manner intended.

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Where a person appears before a surrogate to oppose probate of a will, he is bound, if required by the adverse party, to propound his interest, or show his right to contest the will.[1]

If issue is taken on the allegation of interest, the evidence in relation to that question and that which relates to the validity of the will should proceed *pari passu*.

A person claiming as next of kin should in his allegation of interest show how he was related to the deceased.

An allegation, by a party coming to contest a will, that he is nearer of kin to the deceased than any other person residing in the United States, is not sufficient.

THIS was an appeal from the decree of the surrogate of the city and county of New York, establishing an unexecuted paper propounded by the respondents as the will of John G. Leake. The father of the decedant was a British officer, who came to this country about sixty years since, with his two sons, Robert W. and John G., and died in the city of New York, in 1774. He had one daughter, who died before her father, and without issue. Robert W. mar-

[1] See 2 R. S. (4th ed.) 244.

ried the sister of John Watts, the respondent, and died in 1788, leaving his wife and one child him surviving. The child died a few years afterwards, but the widow is still living in England. The decedent studied law as a profession, and practiced for a number of years in the city of New York. He was never married, and during the latter part of his life, although he kept house, yet he had no family except two colored domestics. He lived like a hermit, seeing no company, and seldom leaving his house. He died in June, 1827, between seventy and eighty years of age, leaving a personal estate estimated at about \$250,000, and a real estate nearly as large. He had become much enfeebled by age, and had been more unwell than usual for several days before his death, but retained his senses to the last. After his decease, the instrument propounded was found in an iron chest where he had for many years been in the habit of keeping his valuable papers. It was written on a large sheet of conveyancing paper, but neither enclosed or indorsed, and was found lying between the leaves of a field book made in 1802, but in which some memorandums had been made as late as 1806. The will was in *the handwriting of the testator, was carefully written throughout, and was as follows:

"In the name of God, amen. I, John G. Leake, of the city of New York, make this my last will and testament, humbly hoping for eternal happiness through the mercy of God and the mediation of my Saviour. I hereby nominate, constitute and appoint my friends, Robert Watts, John Watts, Herman Le Roy and William Bayard, all of this city, and the survivors and survivor of them, executors and trustees of this my last will, and for the care and trouble they will have in executing of the same, and as a mark of my sincere esteem and regard, I give and bequeath unto each of them one thousand dollars. After paying my just debts and funeral expenses, I give and bequeath unto the rector and inhabitants of the Protestant Episcopal Church in this city, for the use of their charity school, one thousand

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and all moneys arising from the sale or sales of my lands by virtue of any contract or agreement as aforesaid, and also the said bank shares, or the net proceeds thereof, on the decease of the said Margaret Leake, to and for the use, benefit and behoof of Robert Watts, the second son of my friend and executor John Watts, and his heirs, upon this express condition, that the said Robert Watts and his heirs shall and do take the name of Leake, and by that surname be called and known forever thereafter; and until the said Robert shall arrive at legal age, I give my said executors and trustees full power to lease, sell and dispose of, in fee or otherwise, any part or parts of my new lands, if they shall judge it for the advantage of the estate. But if the said Robert Watts shall die under age, and without lawful issue, or shall refuse to accept of this devise and bequest on the aforesaid condition, then it is my will, and I hereby order and direct that the said bank shares, upon either of the last mentioned contingencies taking place, and at the said Margaret Leake's decease, or the net proceeds thereof, in case of the non-renewal of the charter, shall be equally divided amongst the oldest surviving sons of my said executors, and that all the rest, residue and remainder of my estate real and personal in the hands and possession of my said executors and trustees upon the death or refusal of the said Robert Watts to accept as aforesaid, shall be likewise immediately thereupon conveyed and transferred by my said executors and trustees, the survivors *and survivor of them, unto the rector and church wardens of the Protestant Episcopal Church, the presiding or eldest minister of the Dutch and Presbyterian congregations respectively in this city, and their successors, together with the mayor and recorder of the said city, and their successors, upon this special trust and confidence, to be by them appropriated to the purchasing and endowing of a house, or of ground to erect and endow a building in the suburbs of the city, for the reception, maintenance and education from time to time forever thereafter of as many helpless orphan children,

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1829. (paying no regard to the country or religious persuasion of their deceased parents,) until they shall severally arrive at an age to be put out apprentices to trades or services, as the said trustees shall deem the annual income arising from said estates fully adequate to support; and to be under such rules and regulations, with such and as many attendants for the management and government thereof as a majority of said trustees shall judge to be most useful and expedient; nevertheless, it is my will that no part of the estates devised shall be applied towards the purchasing or erecting of the building aforesaid, but that the expense shall be defrayed solely out of the rents, issues and profits. And I hereby give unto the said trustees full power to lease for a term of years, and to sell and dispose of in fee, or otherwise, for the best price and consideration that can be had or gotten for the same, any part or parts of the said real estate, and good and sufficient deeds and conveyances in the law thereupon to make, seal and deliver; placing all moneys accruing from such sale or sales at interest on the best and most permanent security for the better support and extension of the charity. I hereby revoke all former wills by me at any time heretofore made, and declare these presents only to be and contain my last will and testament. In witness whereof, I have hereunto set my hand and seal the — day of —, one thousand eight hundred. [L. S.]

"Signed, sealed, published and declared by the testator, as, for and to contain his last will and testament, in the presence of us, who at his request, in his presence and that of each other, subscribed our names as witnesses thereto."

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*No formal allegation of facts to support the paper propounded, was put in before the surrogate; but probate thereof was opposed by the public administrator of the city of New York, who claimed the administration of the estate of the deceased, on the ground that he died intestate, and without leaving any relatives. John L. Norton also opposed the probate, and claimed administration as the next of kin. His allegation of interest was as follows: "Your

petitioner has been informed and believes that John G. Leake, late of the city of New York, deceased, and who died in the said city, on the second day of June last, has repeatedly declared and admitted to others, that he was related to your petitioner. And your petitioner, confiding in the truth of the said representations, does verily believe that he is nearer of kin to the said John G. Leake than any other person now residing in the United States of America, and that he is legally and justly entitled to the administration of the estate of the said John G. Leake, and his next of kin." The respondents objected to this, as an insufficient allegation of his interest; but the surrogate decided, it was sufficient to authorize him to be heard in opposition to the will. After hearing the proofs of the respective parties, the surrogate pronounced in favor of the will; and Norton, and the public administrator, both appealed to this court from the decree of the surrogate. The following is the opinion of the surrogate, delivered in support of the will:

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J. Campbell, Surrogate:—The present subject of controversy has been submitted to me by the parties, without argument, after a laborious and protracted investigation. The important question of law to which it gives rise, and the vast amount of property involved in its issue, renders it a case of extraordinary interest; and in proceeding to decide it, I am only encouraged by the reflection, that should the judgment that I am about to render prove erroneous, it may be easily corrected by an appeal to a higher and more competent forum. It happens fortunately that the case is not embarrassed by any preliminary difficulties; there are no contending papers to be disposed of, and no doubts are entertained with *respect either to the handwriting or the mental capacity of the deceased.

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Mr. John G. Leake, an aged and respectable inhabitant of this city, recently died, without leaving any relatives that have yet been satisfactorily ascertained. on whom his

1829. estate would legally devolve. He was born in England; and when about the age of fifteen, he came to this country, near sixty years since, in company with his father and brother. Soon after his arrival, he commenced the study of law in the office of James Duane, then a practicing and eminent lawyer in this city; and here his intimacy with Mr. John Watts, who was a fellow student in the same office, commenced; an intimacy that afterwards ripened into friendship, and which continued without interruption to the period of his death. The father, Robert Leake, was a commissary-general in the British army: he died in this city about the beginning of the year 1774, having had three children, Ann Margaretta, Robert William and John George, the deceased, who were the issue of his first marriage; by his second wife, whom he married in this country, he had no children. Ann Margaretta remained in England; she married a Mr. William Fenwick and died a short time before her father, without issue.

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The brother, Robert William, held the commission of a major in the British army. After the American revolution, he returned to England, where he died some time in the year 1788. He married a sister of Mr. John Watt; she still survives, and, is now residing at Southampton in England. By this marriage there was one child, a son, who died at the early age of eight, in the year 1798. His premature death was long and deeply lamented by the deceased, and there is good reason to believe, had his life been prolonged to the present day, he would have been the sole and undisputed heir of this estate. For his sister in law in England, he appears to have cherished a constant and sincere affection; she stood in need of assistance, in consequence of some severe losses which she had sustained, and it is in proof that he relieved her wants, by furnishing her from time to time with pecuniary aid. The deceased was never married; his mode of life was *recluse and solitary, never visiting, and seldom visited; having but few acquaintances, and still fewer associates; in his latter years

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he was almost forgotten. He was intelligent and fond of conversing, but in his communications in relation to his estate, he is represented by all to have been fastidiously close and reserved. Perhaps the most he was ever known to disclose on the subject, was in the casual declaration he once made to Mr. Philip Brasher, that he intended the bulk of his estate should remain in this country.

In a closet or pantry adjoining his sitting room, and communicating with it by a door, stood an iron chest, of small dimensions, which contained his valuable papers, family jewels, and money for immediate domestic use. This chest was always kept locked, and the key of it was carefully retained by the deceased himself. His unimportant and obsolete papers were placed in common trunks, that lay in the second and third stories of the house. To the iron chest, the deceased had frequent occasion to repair; indeed, hardly a day passed, without his opening it for some purpose or another. Often his table would be covered with papers, taken out by himself, and if any of them had been opened, he would carefully fold them up before he replaced them. The papers in this chest were generally indorsed on the outside, and in their disposition and arrangement, he appears to have been extremely exact and methodical. About two weeks previous to his dissolution, the deceased being quite feeble and infirm, visited the iron chest for the last time. He was supported in going to it from his bed room up stairs, by his trusty and intelligent servant Abraham Casey, who unlocked the chest for him, and retired. Here he remained some time alone, and when the witness returned in order to reconduct him to his chamber, he observed that the deceased had something under his arm, which was entirely concealed from view under his morning gown. There is good reason, however, to conclude, that it was a parcel or bundle of papers; because when the witness again entered the room, he discovered from the cinders in the grate, that during his absence, the deceased had been engaged in burning papers.

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1879. *Immediately after his decease, the iron chest was opened
 The Public in the presence of several respectable citizens; and in it
 Administrator was found, in a thin land-book, which lay about one-third
 v. the way towards the bottom of the chest, the paper prop-
 Watts and Le pounded, enclosed in a blank envelope.
 Roy.

Norton In the position in which this book lay in the chest, it
 v. could not have been seen without first removing some
 The Same. papers that covered it. The paper is a large sheet, and the
 one in which it was found enclosed is of a similar size.
 When it was written, cannot at the present time be ac-
 curately determined; the words "one thousand eight hun-
 dred" are written out at length; the day, month and the
 year are left blanks; but from evidence derived from the
 instrument itself, it was probably written many years back.

The paper discovered in the manner related, is a long,
 full and formal will, written throughout in the handwri-
 ting of the deceased, without erasures or alteration; in all
 its parts perfect, and wanting nothing to render it for every
 purpose effectual, but his signature and the usual attestation
 of subscribing witnesses.

By this paper the deceased, after, among other things,
 bequeathing to his sister in law Mrs. Margaret Leake, his
 plate, household linen, and the jewels of his deceased step-
 mother, and making in addition a provision for her sup-
 port during her life, devises and bequeaths all his residuary
 estate, both real and personal, to Robert Watts, the son of
 his friend Mr. John Watts, on condition of his assuming
 the surname of Leake, and that he and his heirs be forever
 called and known by that name.

The paper thus unexecuted, though acknowledged to be
 void as to the real, has been propounded by the surviving
 executors named in it, as containing a good and valid dis-
 position of the personal estate.

The right of devising real estate did not originally exist
 at common law. This power was first given by the statute
 of Henry the 8th, denominated the statute of wills; and
 long after this period, in the reign of Charles the 2d, the

statute of frauds was enacted, which prescribed the formalities with which wills must be executed, in order to pass real estate. *Previous to the last-mentioned statute, a disposition by testament, of personal estate, was good without the signature of the testator, or any solemnity of publication. The statute of frauds made no alteration in this respect, and with the exception of some regulations in regard to nuncupative wills, the common law in relation to the disposition of personal estate by will remains unchanged.

The cases in the books are numerous, where loose and informal papers, without date or signature, have been held to be entitled to probate.

In papers of this description, the final disposing intention is principally regarded; and where this is satisfactorily ascertained, I am not aware that any cases exist where they have been rejected. (Swinburne, part 7, sect. 12. Same, part 1, sect. 2, page 6, and the cases there cited. Shepherd's Touchstone, 409. Chancery Cases, 273. 28 Car. 2, and the cases in Phillimore and Adams' Reports.)

The courts of this state furnish no cases that directly bear on the one under consideration. All the decisions having relation to the present matter in controversy are derived from England, and may be divided into two classes, the ancient and modern. The former constitutes a series which extends from the time of Queen Elizabeth to the era of our revolution; the latter embraces those that have subsequently occurred. Under the authority of the ancient cases, the testamentary validity of the present paper would not admit of much doubt; but according to the modern, its claims to this character do not appear quite so certain. By the constitution of this state, sec. XIII, art. 7th, only such parts of the common law as formed the law of the colony of New York, on the 19th of April, 1775, are recognized as law in this state: of course the decisions of English tribunals since that period, however much entitled to respect as mere opinions, are not obligatory here as legal authorities; but assuming that they were, I am inclined to

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think that this paper may be established as a will, even on the principles advanced by those decisions.

Agreeably to the later determinations at doctors commons, there are two circumstances unfavorable to this paper; *the one is the addition of the attestation clause, the other is the length of time it was suffered to remain unexecuted. If personal estate only were bequeathed by this paper, there would have been more weight in the first objection; but as the deceased was also possessed of real estate, the future execution of it, in order to pass the latter, implies, I apprehend, no want of the *animus testandi* with respect to the former: on the contrary, it seems to be perfectly consistent with it. Independent, however, of this circumstance, the addition of an attestation clause is regarded as a circumstance in the highest degree equivocal, and it has been repeatedly decided, that it creates but a slight presumption against the validity of any testamentary paper. (*Harris v. Bedford*, 2 Phillimore's Rep. 177; *Beatty v. Beatty*, 1 Adams' Rep. 154; *Doker v. Goff*, 2 Adams, 42.)

In duly estimating the force of the second objection, arising from time, it must be remembered that the instrument in question is an unexecuted will, and is carefully to be distinguished from one which is both unexecuted and unfinished. It is written in a fair legible hand, and, in all probability, was engrossed from a draught, from the fact of its being entirely free from all erasures, interlineations and obliterations. In addition to all this, it is drawn out with professional skill and precision; and bears evident marks throughout of being a work requiring much time, labor and reflection, before it was brought to its present state of maturity. Whether the paper be unfinished or unexecuted, the presumption of law, it is alleged, is against either; but in the latter case it is slight, and may be rebutted by extrinsic evidence. (*Mortiflore v. Mortiflore*, 2 Adams, 354.)

Where a testamentary paper is unfinished, or merely in progress towards completion, nothing excuses its immediate execution, but inevitable necessity, or the act of God.

(*Sandford v. Vaughan and others*, 1 Phillimore, 39.) But if the paper be perfect in every other respect, except in being executed, the same strictness is not exacted, and a much greater latitude is allowed; nor have I, in the course of my researches, ever met with a case, either ancient or modern, where *length of time by itself has been held sufficient to reject a paper of this description. On referring to the cases in which unexecuted wills have been refused to be established, I believe it will be found, that in addition to the consideration of time, evidence has been admitted to induce a belief, either that they were never intended as final testamentary dispositions; that they were only preparatory to something further, or else that they have been subsequently abandoned.

Having briefly noticed the legal presumption existing against the paper, on the authority of the modern adjudications, it remains to be seen whether they have not been successfully repelled by the testimony which has been adduced in the course of the investigation.

It sufficiently appears from the proof, that the deceased was a person of singular manners, of indolent habits, and of a procrastinating disposition. An extreme aversion to communicate any thing respecting his private affairs, even to those with whom he was most intimate, was a conspicuous trait in his character; nor is it at all improbable that it was the influence of this feeling that prompted him to write and copy his will himself, and which afterwards restrained him from executing it in proper legal form.

The presumption against this instrument from lapse of time is, in my opinion, successfully repelled by the fact of its careful preservation, for a long period, among his valuable papers. Unless it was in the contemplation of the deceased that the paper should have a testamentary effect, the keeping of it in the manner that has been related, can only be accounted for on the supposition, either that he had entirely forgotten it, or that he considered it would be inoperative, from the circumstance of its not being and

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1829. acknowledged in the presence of witnesses. Granting, for the sake of argument, that it was forgotten, I do not perceive how mere forgetfulness would invalidate it, if the maker possessed the *animus testandi*. So far from having any such effect, it is believed it would rather weaken the objection founded on the circumstance of time. Be this, however, as it may, I am satisfied that the paper was never out of his recollection.

[*359] *To write an instrument like the one in question, was an extraordinary act for the deceased to perform: it was, moreover, a work of great deliberation: and when superadded to this, it is remembered that he was in the daily habit of repairing to this chest, and that he was also frequently in the practice of taking out from it papers, and of afterwards replacing them, the conclusion is inevitable, that the existence of this paper was never effaced from his memory. Equally improbable is the hypothesis that he neglected to destroy it, from a confidence that it could never have any operation as a will, by reason of its not being executed. It is irreconcilable with his known and acknowledged character for caution and prudence, to believe for a moment, that he would run the hazard of leaving behind him an important document such as this, under a loose and vague impression that it would have no testamentary effect. Let it be recollected, too, that he was a lawyer by profession; he was not, therefore, *inops consilii*, and it is fair to presume, from his own readings and experience, that he must have known of instances where papers, much less formal, had been admitted to probate.

As a proof of his careful and vigilant disposition, a few days previous to his death he goes to the iron chest, in order to search among his papers; nor does he stop here; he is observed to take out some, which he afterwards burns. If he were apprised of the existence of this paper on this occasion, (and that he was, I think the circumstances previously detailed justify the belief,) does not the omission to destroy it almost amount to its recognition? Even on the

supposition that he considered it as a useless and unimportant paper, would it not have occurred to a man of his habitual caution and prudence, that it might hereafter produce trouble, and that it would be the safest course not to leave it behind? Had no other reasons existed, I believe a sense of propriety, and the respect which he entertained for his friend, Mr. John Watts, would have determined him to have committed this particular paper to the fire, at the same time that he consigned the others to that element.

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Another circumstance in favor of this instrument, and in my opinion a pretty strong one, are the bequests contained in it to his sister in law, Mrs. Margaret Leake. A letter has been produced in evidence, bearing date the 26th November, 1822, from the deceased to Mr. John Watts, when in England, from which I make the following extract, and which, whilst it strongly expresses his attachment to that lady, displays in a striking manner the character and feelings of the writer :

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"Now for your hint: if two, three or four hundred dollars will add to the comfort of our sister, you shall remit it annually with her other stipend. Offer my affectionate regards, and say that I stand self-condemned for not acknowledging her repeated favors, and cannot promise amendment; for such is my want of spirits and indolent habits, a pen is to me a torpedo."

This lady, it will be observed, he calls by the fond and endearing name of sister. She had received decided proofs of his brotherly love and kindness in his lifetime, and from the paper in dispute, it would seem that it was far from being his wish that she should be left unprovided or destitute after his decease. The voluntary proffer on his part to remit to her annually, and the fact of his actually doing so up to the time of his death, shows not only in what high estimation he held her, but is also evidence of a continuance of testamentary intention; because, had he died intestate, as they were no ways connected by the ties of consanguin-

1822. ity, she never could have derived the smallest benefit from
 The Public his estate.
 Administrator And may not the declaration in this paper, of his hold-
 v. ing certain lands in trust for Benjamin Huggert and his
 Watts and Le heirs, have been another motive for preserving it? This
 Roy. trust appears to have been of a secret and confidential
 Norton character. No memorial of it has been found among his
 v. other papers, and but for the existence of this instrument,
 The Same. it would, in all probability, have forever remained un-
 known. The disposition the deceased has made of his
 estate in this paper corresponds with the declaration he
 made to Mr. Brasher, that the greater part of it would re-
 main here; and it also accords with the expectation long
 entertained by those most intimate with him, that he would
 leave it in the family of Mr. John Watts.

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*It is further to be observed, that there was nothing in the situation of the deceased that could render an intestacy desirable; indeed, there were good reasons why he should have been anxious to avoid it. In the event of an intestacy, he must have known that his personal estate would go into our city treasury, to await the claim of remote relatives, if any such exist; a consequence this, which he surely could not have contemplated with any kind of complacency. Situated as he was, detached from society, alone and solitary, without wife or children, or any near kindred, it was a natural feeling that he should desire to have his name perpetuated, and where was it more probable that he would look for a person to take it, than to the son of his ancient friend and contemporary, Mr. John Watts?

These considerations in favor of this paper, I apprehend, are not impugned by any opposing facts or circumstances. Certainly little or no importance is to be attached to the declaration the deceased is represented to have made, that he had or would make a provision for his servant Casey, as a reward for his faithful services. Allowing that he was not misunderstood, it is well known that promises of this nature

are sometimes made, merely to avoid importunity, when there is no real or serious intention to perform them. It is sufficient that no paper has been found containing this provision, and that no evidence has been offered to induce a belief that any such ever existed.

My sentiments being favorable to the establishment of this paper as a will, it becomes unnecessary to express an opinion on the question, whether Mr. John L. Norton has succeeded in proving himself to be of kin to the deceased.

In conclusion, I pronounce for the paper propounded, and I further order that the letters of administration (*ad colligendum*) heretofore granted in this case to Silvanus Miller, Esq., be revoked.

C. Baldwin, for the appellant Norton:—This is not a will. It was drawn in 1800, and was not consummated. It was left in an unfinished state to be afterwards executed. To make a valid will, it is necessary the testator should, at the *time of its execution, have the *animus testandi*. A blank for the insertion of the day and the month is not alone of much importance in deciding upon the *animus testandi*. It is evidence, however, in this case, that the paper propounded as a will was only prepared for further consideration. It is in proof that the testator was very exact and particular in all his transactions. He was a lawyer by profession, and was acquainted with all the forms of executing wills. He drew Ann Leake's last will and testament. If he had intended this as a will, he would have signed it at the bottom in the usual manner. The cases on the subject of signing, only tend to show that a signing in the commencement of a will is good, where there is an attestation in the presence of witnesses. Where a will, as in this case, disposes of real as well as personal property, and it is void as to the real property, it is void as to the whole. A condition of the bequest to Robert Watts is, that he should change his name. There is conclusive evidence in this case that John G. Leake abandoned all intention of making a

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1829. will. He delayed until 1827, twenty-seven years, without
 The Public executing this paper, or altering its provisions so as to con-
 Administrator form it to the altered situation of his property, and the
 v. varied claims of his friends. A part of the executors named
 Watts and Le Roy. by him had died; and the remainder had become incom-
 petent by age. If he had intended this paper to operate as
 Norton a will, he would have appointed new executors. The le-
 v. gacies to Susanna Barker and his servant man, had lapsed
 The Same. by their death during his lifetime. The direction in this
 paper to the executors to convey the lands held in trust for
 Huggert, to his heirs, is no proof of any intention to de-
 vise, as there might be other evidence of the trust than that
 contained in this instrument; and the presumption is, that
 the trust became extinct by the lapse of time. The will
 has become inoperative as to the contracts of Sanger. The
 charter of the bank of the United States expired in 1811,
 and the testator received not only the dividends, but the
 whole of the stock itself, the income of which he gave by
 this proposed will to Mrs. Robert Leake. Her right there-
 fore to the income was gone, and her interest cannot be
 urged as an argument in support of this paper as a will.
 [*863] The testator was a stranger to Robert *Watts. He was only
 the son of his friend John Watts. If the testator ever had
 the intention of making Robert Watts his heir, he must
 have abandoned it before his death. His property, both
 real and personal, increased to a great amount after he
 drew this paper. If he had intended it to operate as a will,
 he would have republished it, or have made a codicil in
 order to pass his after-acquired land. The neglect on his
 part to execute this will is an implied abandonment or re-
 vocation of it. The question is not now, what the testator
 intended to do, but what he has done. If he intended that
 his real as well as his personal estate should pass by this
 paper, it is a strong presumption that it was only a deliber-
 ative act, and that something further was intended by him
 to be done. The place where, and the circumstances under
 which this paper was found, show conclusively that it was

not the intention of the testator to leave it as his will. The iron chest in which it was deposited and kept, contained many useless papers. It was placed in a sheet of blank paper, upon which no indorsement was made by the testator, recognizing the enclosed paper as his will, which is customary. If the paper had been sealed up, and the testator had indorsed upon the wrapper that his will was enclosed, it would have been strong evidence of the testator's intention that it should operate as his will. But the circumstances of this case manifestly show that some further act was to be done by the testator, and that he intended at some subsequent time to complete what was then in an imperfect state. The counsel cited the following cases: *Scott v. Rhodes*, (1 Phil. 12;) *Rymes v. Clarkson*, (1 id. 84, 5, 6, 8;) *Devereux v. Bullock et al.*, (1 id. 60;) *Passmore v. Passmore*, (1 id. 216;) *Carstairs v. Pottle*, (2 id. 80;) *Harley v. Bagshaw*, (2 id. 48;) *Read v. Phillips*, 2 id. 122;) *Dickenson v. Dickenson*, (2 id. 173;) *Harris v. Bedford*, (2 id. 177;) *Nichols v. Nichols*, (2 id. 180;) *Huntington v. Huntington et al.*, (2 id. 213;) *Newell v. Weeks*, (2 id. 224;) *Sikes v. Snaith*, (2 id. 351;) *Denny v. Barton & Rashleigh*, (2 id. 575;) *Satterthwaite v. Satterthwaite*, (3 id. 1;) *Thomas v. Wall*, (3 id. 23;) **Friswell v. Moore*, (3 id. 135;) *Buckle v. Buckle*, (3 id. 328;) *Ferricane v. Gayfere*, (3 id. 405;) *Bail v. Main*, (3 id. 505;) *Forbes v. Gordon*, (3 id. 614;) *Rose v. Mouldsdales*, (1 Adams, 129, 134;) *Beatty v. Beatty*, (1 Adams, 154;) *Wigg v. Wigg*, (1 Atk. 888;) *Montefiore v. Montefiore et al.*, (2 Addams, 354;) *Matthews v. Warner*, (4 Ves. 186, 197, 209;) *Doker v. Goff*, (2 Addams, 42.) The allegation of the interest of Norton is sufficient.

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J. Platt for the public administrator:—Norton was bound to establish, in like manner as in ejectment, his relationship to the deceased. The testimony shows that there was no relationship by blood.

It is undoubtedly true, that a will of personal estate may be good, although not published in the presence of wit-

1829. *nesses.* (Swinb. on Wills, pt. 1, sec. 3, p. 6. Rob. on Wills, 72, 93, 105, Am. ed.) And it is sufficient if a will be signed at the top only, if it be sealed at the bottom, and published and duly attested by witnesses. (*Semoyne v. Stanley*, Swinb. pt. 1, sec. 11; 1 Rob. on Wills, 94, 95, 107; *Skinnors' R.* 227; *Right v. Price*, 1 Doug. R. 244; *Norton v. The Same.* *Warneford v. Warneford*, 2 Strange, 764; *Smith v. Evans*, 1 Wil. 313.) In the time of Bracton, the signature of witnesses was required. (*Allen v. Hill*, Gilb. 260.) Nuncupative wills were good before the statute of frauds and perjuries; and since that statute, the attestation of witnesses is not necessary to the validity of wills of personal estate. (*Limbery v. Mason*, Com. R. 451; *Hyde v. Hyde*, 1 Eq. Cas. Ab. 409; 3 Rep. in Ch. 155; 1 Shep. Touch. 399, 408.) Unfinished papers have, in some cases, been established as wills where the testator was prevented from executing them by sudden death. (*Sandford v. Vaughan*, 1 Phil. 39; *Bone v. Spear*, id. 345; *Lavender & Churchhill v. Adams*, 1 Addams' R. 406.) But wherever the testator proposes alterations, it is evidence that the instrument he intends as his will is a deliberative act only, which is afterwards to be completed. (*Lavender v. Adams*, 1 Addams, 406.) A delay of two months in the execution of a will has been ruled to be sufficient evidence of an abandonment of the intention to make a will. (*Antrobus v. Nepean*, 1 Addams, 399; *Warburton v. Burrows*, id. 383.) And even where the neglect to complete a will is only nine days, the presumptions are against it. *(*Griffin v. Griffin*, in note to 4 Ves. jun. 197; Rob. on Wills, 175; *Coles v. Trecothick*, 9 Ves. 249; 1 Rob. on Wills, 176.) We have no testamentary law, except what is derived from the English books. The paper in question, propounded as a will, is imperfect, unfinished and unexecuted. It was prepared with a view to the relative situation of the property of the deceased, and the claims of his friends as they then existed. The day and month being blank, shows that the testator did not then intend to execute the will. The addition of

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an attestation clause is evidence of his intention that it should not go into effect without execution. The testator intended to devise his lands as well as to dispose of his personal estate; and yet he, as a lawyer, knew that this instrument could not accomplish his object. It is improbable that he intended to distinguish between his real and personal estate; to die intestate as to the one and not as to the other. Long before his death his circumstances changed, and some of the principal dispositions of his property became void. His property was large; and the thought cannot be indulged, that attached to it as he was, he would leave it to depend on this loose, unexecuted paper. He may not have seen or thought of it for twenty years. There are no circumstances in the case to account for the delay of its execution, if the *animus testandi* continued. It cannot be supposed that a man would remain of the same mind for twenty-seven years, unless all the circumstances continued the same. One month's delay to execute this instrument, would, according to all the authorities, be sufficient cause to reject it. There is no proof that the testator ever opened or looked at it since the year 1800. He might then have intended to make a will. But it cannot be presumed that he intended to make this particular disposition of his property. Both his real and personal estate have undergone material alterations since the will was drawn. The widow of Robert Leake is now left unprovided for. The bank stock out of which a provision was made for her was received by the testator fifteen years before his death. The testator never saw Robert Watts, the principal devisee named in this paper, after he was a *child. If Robert Watts had continued the principal object of the testator's bounty, is it possible the testator would not have seen him during all this time? The testator clearly must have abandoned the idea of making him his principal devisee, inasmuch as he had given up hopes of raising through him a family to perpetuate his name. No provision being made in this paper for the testator's faithful domestics, Casey and

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the black woman, the slave to whom he had given a legacy having died a long time since, and the peculiar place in which this paper was found, give rise to strong presumptions against it. There is no evidence that the testator had a habit of procrastination. If he had, he never could have acquired half a million of dollars. The rule in reference to a sudden death's preventing the execution of a will, means a death while the act is *in fieri*; and before the testator had a reasonable time to execute the will. The deceased was old, misanthropic, and miserly. He was in doubt what disposition to make of his property; and died before he determined upon whom he should bestow it.

S. A. Talcott, for the respondent:—The allegation of interest by Norton is not sufficient to authorize the proponents of the will to put in a counter allegation. There is no evidence that Norton was a blood relation of the deceased. The will in question is perfect except as to the execution. The interest of the proceeds of the bank stock passed by the will to the widow of Robert Leake, notwithstanding the stock itself was paid to the testator. There is no improbability that the principal devisee named in the will, will yet raise up a family. At the time the testator drew the will he must have intended that it should take effect. A will may be perfect without being executed in presence of witnesses, although there be an attestation clause and a blank for the date. (Swinb. pt. 7, sec. 2, 12; Kilway, 209; Brownlowe, 44; S. C. Dyer, 72; Chan. Cas. 273.) If the testator intended the will should operate as to the personal property, although he never executed it so as to pass the real estate, it is good. If this instrument was a will of personal property, the true question is as to the *animus testandi*. (1 Serg. & Rawle, 268, per Tilgham, C. J.) Slight evidence is sufficient to rebut the *presumption arising from the attestation clause. It was perfectly natural for the deceased to give his property to the Watts family. John Watts was the friend of his youth. The

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circumstances under which this will was found are in favor of its validity. It was in the handwriting of the testator. (*Scott v. Rhodes*, 1 Phil. 12, 17; *Shep. Touch.* 409; 1 *Addams*, 53, 164, 375, 456, 492; 2 Phil. 122; 2 *Addams*, 356.) Many persons postpone making a will from the belief that it is the precursor of death. The testator might have left the will unexecuted, in order to embrace all his after-acquired estate. It was found in a book not made until 1806. The testator told Brasher that he should leave the bulk of his property in this country. He could not have intended to die intestate, leaving his property to escheat, and his sister unprovided for. If this was his intention, why did he not destroy the will? The execution of the will might have been prevented by the act of God; and this by the ecclesiastical law means any extrinsic circumstance which prevented it. A habit of procrastination is considered the act of God. (*Allen v. Manning*, 2 *Addams*, 500; *Warburton v. Burrows*, 1 id. 383.) Lapse of time in executing a will is only evidence of an abandonment of the *animus testandi*. (2 *Addams*, 358; *Scott v. Rhodes*, 1 Phil. 20.)

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J. V. Henry, same side:—The will leaves nothing undisposed of. The bequest of the bank stock did not lapse by the expiration of the charter of the Bank of the United States and the payment of the stock to the testator. The statute of frauds, (1 R. L. 367, s. 16,) does not alter the common law. If this paper was once a good will, it could not have been altered, except by an instrument in writing. (*Swinb. on Wills*, 80, 81, and note.) Signature is not necessary at the bottom of the will. The testator was a lawyer, and well acquainted with the formalities of executing a will. He intended to keep the will unexecuted until the last moment, in order to pass all his real estate. The will is perfect as to the personal estate. (2 *Black. Com.* 501; 2 *Swinb.* 639, and notes; *Toller*, 2; *Loveless*, 154; *Butler v. Baker*, Co. 81; *Stephens v. Gerard*, Keble, 128; *Swinb.*

1829.	80, 81, and notes; 3 Com. Dig. tit. <i>Devise</i> , E. 1; <i>Siderfin</i> ,
The Public	*315, S. C.; <i>Rolph v. Hanley</i> , 1 Dyer, 336, 72 a; <i>Nash v.</i>
Administrator	<i>Edmunds</i> , 1 Cro. El. 100; 2 Keble, 345; <i>Peate v. Ougley</i> ,
v.	Com. R. 199; <i>Powell v. Belstock</i> , 2 Ray. 1282; <i>Irish v.</i>
Watts and Le	<i>Pelham</i> , 2 Vernon, 647; <i>Beauchamp v. Earl of Hardwick</i> ,
Roy.	5 Ves. 280; 1 Adams, 159; 2 id. 357, 46; 2 Phil. 177,
Norton	185, 173; <i>Greenough v. Martin</i> , 2 Adams, 243.)
v.	
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THE CHANCELLOR:—The barrenness of our books on the subject of testamentary law has compelled me to bestow much labor upon the investigation of this case, and much time has been employed in obtaining those books which were necessary to be examined by me before I could, in justice to the parties in this cause, bring that investigation to a close. It is but a few years since any thing like regular reports of testamentary causes were attempted even in England, and in this state not more than half a dozen cases are to be found in the forty-six volumes of our own reports, and very few in the reports of our sister states. Before the revolution, the colonial governors claimed and exercised the prerogative of deciding all testamentary cases, upon the principles which governed the ecclesiastical courts in the mother country. Since that period, the same jurisdiction has been conferred upon the local surrogates, who have proceeded in such matters without much form or system. Although an appeal was given to the judge of probates, very few causes were brought before that court; and it is understood that even there nothing like regular rules of practice were ever adopted. The testamentary law of England, as it existed at the commencement of the revolution, was recognized by the first constitution as the law of this state, and very little alteration has been made in it since, except as to the tribunals in which it was to be administered. Devises of real estate, both here and in England, being regulated by statute, and the ecclesiastical courts there having the exclusive cognizance of wills of personal property, to ascertain what the law was before the

revolution, we are obliged to resort to the recent reports of adjudged cases in England since that time; to elementary writers; to the few cases brought before the superior courts of appeal, scattered through several hundred volumes of common law and Chancery reports, and to a small number of adjudged cases which took place after the statute of 32 Henry 8, allowing a devise of real estate, and before the statute of frauds and perjuries, (29 Car. 2, ch. 3,) which required wills of real estate to be executed in the presence of three witnesses.

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The testamentary law of England was derived from the civil law, and was probably introduced into that country by the ecclesiastics and civilians who came thither with William the Conqueror, or soon after. By the civil law the will of an ordinary person might be in writing, or by parol; but in either case it was necessary to the validity of the testament, that seven witnesses should be present at the making thereof. (Domat, book 3, tit. 1, sec. 3.) Testaments of this description, however, are unknown to the law of England, and were never in use there. But the civil law being introduced into England at the time when the military system was at its height, another species of wills, authorized by the Roman law to be made by officers and soldiers of the army, called military testaments, was adopted, and applied to the testamentary dispositions of every person, whether he belonged to the army or otherwise. (Gilbert's Rep. 260.) This was at a time when, by the feudal system of military tenures, real property was not devisable.

No particular form was required for a military testament, but the testator might declare his will in such manner, as the conjuncture in which he happened to be enabled him to do it, provided his intention appeared by good proof. (Domat, book 3, tit. 1, sec. 2, art. 15.) Thus a military testament might be made orally by the testator's declaring his will in the presence of witnesses, which was called a nuncupative will; or it might be in the form of a written memorandum or declaration of his wishes respecting the

1829. disposition of his property after his death, written by his own hand and signed by him, or written by another and signed by the testator, or reduced to writing in the presence of witnesses, either by the testator or at his request. Domat after describing these several kinds of testaments, and objecting to the nuncupative will on account of the facilities it afforded for fraud, says, "The second kind of testament, written and *signed by the testator, or written by another hand and only signed by him, has not the same inconveniences in it; for the writing is a sort of authentic proof in its own nature, and which would be sufficient to oblige a person even beyond his estate. So, that if a military testament ought to be dispensed with as to the forms, it would seem to follow, from this principle, that it may be sufficient to observe therein a formality, which of its own nature is a perfect proof that he who writes and signs any act, wills and approves that which he has signed; and this is such a proof as suffices in many places for ordinary testaments."

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Judge Blackstone, in his commentaries, (2 Bl. Com. 501,) says, "A testament of chattels written in the testator's own hand, though it has neither his name or seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is his handwriting." For this he cites Godolphin's O. L. and Gilbert's Reports. And Lovell has copied this sentence from Blackstone without any explanation. (Lovell on Wills, 160.) I have not been able to find the Orphan's Legacy; but on referring to Gilbert, the report does not warrant the broad language used by the learned commentator. The passage referred to is as follows; "Even since the statute, if the will be made of goods, and written in the party's own hand without any witnesses at all, it is allowed to be good; but it is not a nuncupative but a written will, and the statute does not require any witnesses to wills of chattels only." (Gilb. Rep. 260.) But from what immediately follows, it evidently could not have been the intention of the writer to declare such a will good, without being signed by the testator, or

some other evidence of the *animus testandi*; for he adds, "But there were many inconveniences found after this statute of Hen. 8, (statute of wills,) for men would set up papers that were not signed by the deceased, and would get witnesses to swear to the publication of it; and this was easily contrived and construed, since there were no solemnities required at the publication of it. If any preparation was made for a will, they would get witnesses, after the decease of the party, to swear to the publication of it; and often old dormant wills were set *up, and the latest wills were smothered by such contrivances." The writer of the Touchstone, (supposed to have been Mr. Justice Doddridge,) before the statute of frauds, also says, "A written testament, when it is written with the testator's own hand, doth prove and approve itself, and therefore needs not the help of witnesses to prove it; and for this cause, if a man's testament be written fair and perfect with his own hand, after his death, albeit it be not subscribed with his name, sealed with his seal, or have any witnesses to it, if it be known or can be proved to be his hand, it is held to be a good testament and a sufficient proof of itself; but if it be sealed with his seal and subscribed with the name of the testator, and can be proved by witnesses, it is the more authentic." (Shep. Touch. 408.) But even there the succeeding remarks of the writers show that other circumstances must be resorted to in such cases to establish the *animus testandi*.

It was undoubtedly on the same principle upon which formalities were dispensed with in favor of military persons by the Roman law, the necessity of the case, that the English civilians, after the statute had required all wills to be in writing, admitted instructions for a will or an unfinished testamentary paper to probate, although the testator intended other solemnities should be observed before it operated as a will, in cases where by sudden death he had not a reasonable time to execute the will in the intended form.

This principle was applied to a will of lands, in *Brown's case*, (Keilway, 209,) soon after the passage of the statute

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1829. 32 Hen. 8, authorizing devises of real estate by will in writing, and before the act of the 29th Charles 2, which required such wills to be executed in the presence of three witnesses. The case was this: the testator being sick, sent for a scrivener to draw his will. When he arrived, he took down some notes of the will, as directed by the testator, and immediately went to his own house with the written notes, and drew out the will of the testator in form agreeably thereto, and finished it before 12 o'clock and went to the testator's house to deliver it to him; but on arriving there half an hour afterwards, he learned that the testator died at 12 o'clock; and in an action between the heir and devisee, it was held by all the justices *that it was a good will of real estate under the statute. This case is stated substantially in the same way by several cotemporary reporters. (Anderson's Rep. 34; Benl. & Dal. 61; 1 Dyer, 72.) The same principle is recognized in a note to *Griffin v. Palmer*, (Brownlow's Rep. 44;) and in the case of *Hinton's will*, made in the 2d year of Edward 6, decided in the court of wards in the reign of Queen Elizabeth, (1 Dyer, 72, b.) In *Stephens v. Gerrard*, decided in the 18th year of Charles 2, (1 Siderfin, 315; 2 Keble, 128,) where it was shown that Sir E. Worsley dictated a writing made by a third person, and caused it to be interlined, and said he intended to write it over again himself, but in the meantime it should be his will, but refused then to sign or publish it as such, and there was an attestation clause stating that he had put his hand and his seal to every sheet, but he had not done it to any, yet it was held a good will. And in *Dime v. Munday*, in the 20th Charles 2, in K. B., (2 Keble, 345; 1 Siderfin, 362, S. C.,) where the testator declared that the lessor of the plaintiff should have the premises in question, and the attending physician put it in writing, and the testator was asked if he approved it, and he said aye and sealed it, but did not subscribe his name thereto, it was held a good will, and the plaintiff recovered. So in the case of *Rolph v. Hampden*, which was before the statute 32
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Hen. 8, (1 Dyer, 53 b,) a paper writing, without subscription or seal, proved by one of the witnesses thereto, was held a valid will of lands devisable before the statute of wills. It was in that case also holden that a will of lands need not be in writing. Wills of personal property, under the English statutes and our own, stand upon the same footing as devises of real estate did after the statute of wills and before the statute of frauds. These cases are therefore important to show what was the law of England as to wills of personal estate at the time of our revolution.

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The importance of the principles involved in this case has induced me also to examine all the reported cases on the subject of informal, imperfect, unfinished or unexecuted wills of personal estate which have been decided in England since the statute of frauds. And with two or three exceptions, *which will be hereafter noticed, I find certain settled and uniform principles running through all the cases; or, at least, governing the decisions in those cases which are reported with sufficient accuracy to enable me to ascertain the grounds upon which the decisions took place. The distinction recognized in these decisions appears, to be between those cases where from the inspection of the testamentary paper, or from the positive testimony of witnesses, or circumstantial evidence, it satisfactorily appeared that the decedent intended the same to operate as his will, without any further act on his part, or the addition of any other formalities, and the cases where some other act or formality was supposed necessary was intended to be done or observed.

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The first class of cases may be denominated imperfect or informal wills. They are to be carried into effect notwithstanding any lapse of time between the making of the same and the death of the testator, unless there is legal evidence of revocation, or the lapse of time, in connection with his acts and declarations, are sufficient to satisfy the court that the paper was deliberative only, and never was considered final by him.

1829. The second class may properly be styled unexecuted or unfinished wills, in the progress of completion, and which the decedent intended should be his will, when completed and executed with all the further solemnities which were contemplated by him. In these cases the will is invalid unless completed within a reasonable time. But if he is prevented from completing the will in the intended form by the act of God, before he has a reasonable time for that purpose, and dies before another opportunity occurs, probate may be granted of the unfinished paper; such as a draft or instructions for the intended will.

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The first case I have been able to find is *Strish v. Pelham*, (2 Vern. 647,) which belongs to the last class of cases. In 1686, the testator sent for a scrivener to make his will, who took it down in characters from his mouth, and it was read to and approved by the testator. The next day the scrivener brought the will properly drawn up for execution; but the *testator, who had then become insensible, died in that state; and it was holden a good will.

The anonymous case before the delegates in 1704, (cited in Com. Rep. 453,) is not stated with sufficient certainty to enable me to ascertain upon what principle it was decided.

The case of *Powell v. Beresford*, before the delegates, in 1707, (2 Ld. Raym. 1282,) belongs to the first class. The decedent wrote a testamentary paper, which on its face was declared to be his last will for fear of mortality, till he could settle it more at large; by which he gave a legacy for 1,000*l.* charged upon his real estate, and subscribed his name to the paper and gave it to the legatee. About a fortnight before his death, he declared he had left with the legatee unquestionable security for the 1,000*l.*, which he had done for fear of mortality, until he could make a complete will, which he intended to do as soon as his wife was brought to bed. He died suddenly, two months after writing the will, while his wife was lying in; and it was admitted to probate.

The particulars of the case of *Wright v. Wallhoe*, in 1710,

(Com. Rep. 452,) are not stated with sufficient certainty to enable me to understand the principle on which the decision was made. But *Warlich v. Pollett*, which came before the court of delegates the next year, (Com. 452,) clearly belongs to the last class of cases. It was an unexecuted will written *in extremis*, the execution of which was prevented by the death of the testatrix before the witnesses, who had been sent for, arrived. The case of *Brown and Heath v. Pocklington*, in 1721, (Com. Rep. 453,) was probably a case belonging to the same class with the last. From the loose statement of the case of *Loveday v. Claridge*, in 1730, (Com. 452,) it is impossible to determine to which class it properly belongs.

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In the case of *Habberfield v. Browning*, in 1773, (4 Ves. 200, n,) the testatrix sent a letter of instructions to her attorney to draw up a will, but on the face of the paper it appeared that she intended the letter to operate as a will if she died before a formal will was drawn up, and for which further instructions were to be sent by her. She died a few months after the letter was sent, and before the will was drawn up. *The delegates pronounced in favor of the letter, as being intended as an absolute will if she died without making any other.

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The case of *Cobbald v. Baas*, (4 Ves. jun. 201, note,) is one of those to which I have before alluded as exceptions to the general current of authority. It was decided in 1781, and is not therefore to be considered binding here, although it was for a time considered so in England. It bears a strong resemblance to the case now under consideration, except that the signature of the testator was there affixed to the will. It was a perfect will of real and personal estate, except that a blank was left for the day and month in the date. The usual attestation clause to wills of real estate was added, but there were no subscribing witnesses. The whole was in the handwriting of Savage, the testator. The judge of the prerogative court pronounced against this paper; but on appeal to the delegates, Sir W. H. Ashurst,

1829. Baron Hotham and Dr. Macham, it being a will both of
 The Public real and personal property, they decided that it was *ren-*
 Administrator *dendo singula singulis* a perfect disposition of the personal
 v. estate; and they reversed the decision of the prerogative court.
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Doctor Adams, in a note to *Beatty v. Beatty*, (1 Adama,
 Rep. 159,) says, the doctrine of the ecclesiastical courts
 Norton from an early period, until the decision of the delegates in
 v. *Cobbald v. Baas*, respecting testamentary papers with attes-
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 evidence must be given to rebut the presumption of law
 against the will, and to show that the testator intended it
 to operate in its present state without being witnessed.
 That decision, however, for some time governed the courts
 of probate, averse as they were to consider it settled law.
 But after the decision of the court of review, in *Matthews v.*
Warner, in 1799, they reverted without scruple to the old
 doctrine of those courts, which has uniformly been adhered
 to in subsequent instances. He also adds, "the judgment
 of the court of delegates in *Cobbald v. Baas*, is now held
 not to be law."

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In *Griffin v. Griffin*, decided in 1790, where the dece-
 dent began a testamentary paper, but being called away to
 dinner, he locked it up, and nine days afterwards died sud-
 denly, *the questions were whether this unfinished paper
 was a revocation of a former will, or whether it was to be
 established conjunctively with the former will. It was de-
 termined that the unfinished paper could have no effect.
 That the testator having lived eight days in health, with-
 out finishing it, the presumption of law was that he never
 meant to finish it. In reference to this case, Lord Lough-
 borough says, "one great principle in the testamentary
 courts, as to imperfect papers is that if the testator declares
 an intention as to property, and has time afterwards to put
 that in writing, and does not, the presumption is, either he
 had not made up his mind, or that he had abandoned the
 intention." (5 Ves. 644.)

Again; in *Coles v. Trecothick*, (9 Ves. 249,) Lord Eldon

says, "The observation is just, that, as to the personal estate, if it appears upon the will that something more is intended to be done, and the party was not arrested by sickness or death, that is not held a signature of the will which purports that there should be a further act."

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In 1796, the Master of the Rolls thus expresses his dissatisfaction with the practice of the ecclesiastical courts which had then been adopted in consequence of the decision in *Cobbald v. Baas*: "I concur in the opinion dropped at the bar, that it is now almost absolutely necessary that the legislature should come to some regulation as to the forms necessary for wills of personal as well as real estate, from the habit the spiritual court has got into of granting probate of all the loose papers that can be found, and sending them to the Court of Chancery to be construed."

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In 1798, this objectionable precedent was again followed by a court of delegates in the case of *Matthews v. Warner*, (4 Ves. 194,) in which case two unfinished testamentary papers, both in the handwriting of the testator, dated and signed with his name, were admitted to probate, notwithstanding the testator lived five or six years after their date; but on an application to the king in council for a commission of review, the question was referred to the Lord Chancellor. In conformity to his opinion, a commission was issued to Beilby, bishop of London, Lord Kenyon, chief justice, and Lawrence, a junior justice of the court of King's Bench, McDonald, *chief baron of the Exchequer, Sir William Scott, judge of the court of admiralty, Rooke, one of the justices of the Common Pleas, and two doctors of the civil law. In November, 1799, this court, consisting of the most distinguished judges and civilians in England, reversed the decision of the delegate, and restored the testamentary law of that country as it existed both there and in this state at the commencement of our revolution.

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The same year the case of *Stakes v. Percy* (cited 1 Meriv. 512, was decided upon the will of Mary Collett. She made her will of real and personal property, dated in 1796, all in

1829. her own handwriting, and subscribed her name, but did not seal it. An attestation clause was added, but it was not witnessed. She died suddenly three years after. The will was found locked in a chest of drawers, enclosed in a piece of paper, on which was written, in her own hand, "Mrs. Collett's will." And yet this testamentary paper was rejected." Norton v. The Same. I presume upon the ground that she originally intended it to be executed in such a manner as to convey real estate as well as personal, which she had abundant leisure to have done; and that there was no evidence that she had altered that intention, or recognized it as her will of personal property only, *in extremis*.

So in *Hammond v. Hammond*, decided in 1801, (1 Meriv. 513,) a will of personal property only, made four years before the death of the testator, all in his own handwriting, but neither signed nor witnessed, was rejected. Then followed the case of *Wade v. Overton*, (1 Meriv. 513,) where the testator wrote a will of real and personal property commencing thus: "I, A. B., do make this my will, all in my own handwriting," &c. A seal was affixed to it, but it was signed only on the first sheet, and was not executed in the presence of witnesses. As all the personal property was mentioned in the first sheet, the legatees insisted that the signature was intended to apply to that species of property only; but the court held the will must be taken altogether, and construed as a whole. It was therefore disallowed.

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The case of *Painter v. Painter*, decided in 1802, (Meriv. 512,) was on a will on real and personal property made *by an attorney, written with the testator's own hand. It was signed and sealed, and had a clause of attestation, but no witnesses. It was kept locked up with other papers of moment. He died suddenly, and this will was rejected.

In *Walker v. Walker*, in 1805, before a court of delegates composed of three common law judges and five doctors of the civil law, (1 Meriv. 503,) where the testatrix made a will of real and personal estate, and signed and sealed it, and a clause of attestation in the common form

was subjoined but not witnessed, and her will was found at the death in an envelope, on which was written, "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons," it was decided the will was not good as to the personalty.

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From several of these last cases it would appear that the prerogative court intended to adhere to the principle that a testamentary paper, purporting to dispose of both real and personal estate, if it is not on its face a perfect and finished will of personal estate, shall not, from any extrinsic circumstances, be presumed to have been intended by the testator to take effect as to that part of the property only, when it could not be made operative as to the whole.

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In *Scott v. Rhoades*, in 1809, (1 Phil. Rep. 12,) a will of personal property only of Thomas Burchall, a clerk in the Bank of England, who resided by himself, found very much in the situation of the will under consideration, that is, with a blank for the day of the month, with an attestation clause and seal affixed, ready for execution, but not signed or witnessed, was admitted to probate, on the ground that its execution had been prevented by the act of God. But there it appeared on the face of the will that it had been written within a few days previous to his sudden and unexpected death; and there was other evidence from which it was inferred, that he actually intended to have executed it the very day on the morning of which he was found dead in his room. The language of Sir John Nichol in this case shows the strictness of the testamentary courts, where it is attempted to establish unfinished or unexecuted wills on the ground that the testator was prevented by the act of God from executing them with *all the formalities originally intended. He says: "My predecessors in this place have held the rule strict that the proof must show a continuance of intention, and that the deceased was prevented from completing the instrument by the act of God. It is my duty to tread in their steps, and to adhere to those principles which they have laid down. I am not at liberty to de-

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1829. part from them in any instance, if I were so inclined; but
 The Public there is no point upon which I should be less inclined to do
 Administrator it than upon that now under consideration. I am strongly
 v. impressed with the necessity of applying the rule strictly
 Watts and Le Roy. and with firmness."

Norton From the commencement of Phillimore's Reports, in 1809,
 v. to the present time, there is a regular series of reported
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 have carefully examined all those cases down to 1825,
 which have a bearing upon that now before me, I have
 found no material departure from the principles established
 in the previous adjudications. I shall therefore content
 myself with barely referring to such cases in their chrono-
 logical order: *Sandford v. Vaughan*, (1 Phil. 48, 131;)
Green v. Skipworth, (id. 53;)
Devereaux v. Bullock, (id. 60;)
Bone v. Spear, (id. 345;)
Wood v. Wood, (id. 357;).
Carstairs v. Pottle, (2 Phil. 30;)
Read v. Phillips, (id. 122;)
Monro v. Coutts, (1 Dow's P. C. 437;)
Huntington v. Huntington, (2 Phil. 213;)
Sikes v. Snaith, (id. 351;)
Satherthwaite v. Satherthwaite (3 Phil. 1;)
Thomas v. Wall; (id. 23;)
Musto v. Sutcliffe, (id. 104;)
Lewis v. Lewis, (id. 109;)
Friswell v. Moore, (id. 135;)
Strauss v. Schmidt, (id. 209;)
Buckle v. Buckle, (id. 323;)
Boyle v. Maine, (id. 504;)
Forbes v. Gordon, (id. 614;)
Roose v. Mouldsdale, (1 Addams, 129;)
Beatty v. Beatty, (id. 154;)
Pople v. Cunison, (id. 377;)
Warburton v. Burrows, (id. 383;)
Antrobus v. Nepeau, (id. 399;)
Lavender v. Adams, (id. 406;)
Doker v. Goff, (2 Addams, 42;)
Montefiore v. Montefiore, (id. 354;)
Allen v. Manning, (id. 490.)

The few testamentary cases which appear in the reports of our own country, tend to confirm the principles of the decisions above referred to from the other side of the Atlantic. (2 Nott. & McCord, 531; 2 Marsh. Kentucky Rep. 71; 1 Serg. & Rawle, 263; 12 Mass. Rep. 534.)

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*In the case under consideration, the decedent was a lawyer and well understood what formalities were necessary to make a valid will. Possessing a large real and personal

estate, and without any natural relations, to whom either could descend in case of an intestacy, he had no object in making a will of the one without the other. Under such circumstances, twenty-seven years before his death, and while his bodily and mental powers were in full vigor, after providing for the support of the widow of his deceased brother, the only relative who had any particular claims upon his bounty, and giving a few pecuniary legacies to his executors and others, and to the church at which he worshipped, he determined to adopt the child of his old friend and fellow student as the heir to his overgrown property; and to bestow the whole on him, on condition that he changed his name, and assumed that of the decedent; intending, no doubt, that he should raise up a family to perpetuate the name of Leake. For this purpose he prepared the will in question, ready for execution; precisely as he would have prepared a similar instrument to be executed by a client. From the appearance of this paper there can be but little doubt that in the year 1800, when the will appears to have been written, Leake had fully made up his mind to dispose of his property in the manner indicated by that instrument. But the question here is not what he then intended, but what he actually did. Whatever may have been the cause why the will was not then executed, it is morally certain he did not at that time intend it should take effect, in its unfinished state, as a will of his personal estate merely; leaving his real estate, which at that time probably constituted the bulk of his property to escheat.

The inquiry is not, whether at any time since he prepared that will, he intended to die intestate, but whether at the time of preparing this paper, and at the time of his death, he intended to dispose of his property by that instrument in its imperfect and unfinished state. The respondents rely upon the fact, that Leake went to his iron chest about two weeks before his death, and took therefrom certain papers which he destroyed, and left this paper there, as evidence

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Administrator
v.
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Roy.
Norton
v.
The Same.

1829. that he intended it to operate as a will of his personal estate. But from *the testimony produced before the surrogate, it is extremely doubtful whether he saw it at that time. It was lying between the leaves of a field book, which he would not be likely to inspect on such an occasion. It may have laid there, unnoticed, ever since 1806, when the last memorandums appear to have been made in that book. If his attention had been called to this testamentary paper at a time when, with a view to his approaching dissolution, he was probably destroying mementos that affection had preserved, and which should not be left for the inspection of strangers, I think he would either have destroyed this paper also, or have left some memorandum thereon, showing what were his wishes in relation to its effect as a will of personal estate.

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Administrator
v.
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The Same.

Although an actual signing of a testamentary paper may not be necessary to constitute a good will of personal property, yet the evidence of authenticity derived from the signature of the party is at this day so obvious, especially to a well informed lawyer, that surely he would not have hesitated to add such a proof of his recognition of the instrument. If a pen was to him a torpedo, as he declared in a letter to a friend, he would at least have risked one slight shock, and have filled in the date and put his name to the paper, with a note or memorandum that he wished it to operate as a bequest of his personal estate. It must be remembered that between the time when this will was prepared with so much care, and that when he last visited the depository of the evidences of his great wealth, which he had been hoarding up with such miserly care for so many years, circumstances had materially changed. Two of the executors named in the will had descended before him to the tomb, and the other two must probably soon follow; some of the legatees were dead, and he had survived James, the black man, one of the objects of his bounty, more than twenty years. The stock of the old United States Bank, the dividends of which were by the

will appropriated to the support of the widow of his deceased brother, had been paid off, and the proceeds had gone into the general mass of his property at least fifteen years before his death. The child of his friend, on whom he had *once depended to perpetuate his family name, was now a bachelor of forty, with no prospect of a change in his situation. And what is still more important, it is in evidence from the mouth of Leake himself, that although this principal legatee named in his will lived in the same city, he had never visited the decedent, or been seen by him since he was a boy and led there by his father.

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With all this change of circumstances, if Leake, in the last hour of his life, or at the time when he last visited the iron chest, had been asked, do you intend thus to dispose of your personal property by this will? to leave your brother's widow unprovided for, the faithful Casey without a shilling, and to let your immense real estate escheat to the people of the state? Is it possible to believe he would have answered in the affirmative? I cannot bring my mind to the conclusion that he ever intended to separate his personal property from the realty; or leave this instrument, unexecuted, as the legal evidence of his final intentions in respect to either.

Neither do I believe he intended to die intestate. With the counsel for the public administrator, I am inclined to think he was doubting as to what disposition should be made of the wealth which he could not carry with him; probably hesitating between the son of his old friend, who had disappointed him in the expectation of perpetuating his name, and the relative of his step-mother, who, as he expressed it, was "fiddling with his steam mill at the south." In this state of doubt and uncertainty, the slowly wasting oil of life was at length exhausted; the lamp was extinguished; and the laws of his country have written his testament.

This question being disposed of, the next that arises is which of the two appellants is entitled to letters of admin-

1829. istration on the estate? Without going into a detail of the
 The Public evidence adduced by the appellant Norton to prove his re-
 Administrator lationship to the intestate, I am satisfied that the allegation
 v. by which he propounded his interest was wholly insuffi-
 Watts and Le cient, and ought to have been rejected by the surrogate.
 Roy. Whenever a person comes forward to oppose probate of a
 Norton will, he is bound to state his interest in the question with
 v. sufficient certainty to enable the court to decide whether,
 The Same. if the allegation *is sustained by proof, it will support his
 [*388] claim. He has no right to the administration, unless he
 has an interest in the estate as next of kin. Instead of
 showing how he is related to the intestate, agreeably to the
 ordinary form of allegations of interest, (*Lawrence v. Maud,*
 1 Addams, 331,) he does not even allege that he believes he
 is the next of kin to the deceased. The next of kin of the
 decedent, whether alien or citizen, is entitled to his personal
 estate; therefore, being nearer of kin than any other per-
 son residing in the United States does not entitle him to the
 administration. If the next of kin is not here, or is legally
 disqualified from administering, the public administrator is
 entitled.

The surrogate having decided that the allegation of in-
 terest was sufficient to entitle Norton to be heard, it was
 correct that the evidence in relation to his interest, and
 that which related to the validity of the paper propounded
 as a will, were permitted to proceed *pari passu*. (*Waller*
and Smith v. Hesseltine and Burgh, 1 Phil. 170.) But in
 looking into the testimony as to the interest of Norton,
 there is no pretence that he is the next of kin to John G.
 Leake. He was his relation by affinity, but not by con-
 sanguinity. John Leake of the Hermitage was the great
 uncle of John L. Norton; and the father of John G. Leake
 married a step-daughter of John Leake of the Hermitage.
 They were thus distantly related by marriage; and this
 accounts for all the declarations of the testator that Norton
 was his relative.

There must be a decree entered on these appeals, revers-

ing the sentence and decree of the surrogate of New York in favor of the paper propounded as the last will of John G. Leake, and granting probate thereof. It must also be declared and decreed that the decedent died intestate; that John L. Norton, the appellant, is not his next of kin, is not interested in his personal estate, and is not entitled to administration; but that the public administrator of the city of New York is entitled to letters of administration on the estate. And this cause must be remitted back to the Surrogate's Court, with directions to call in the letters of administration (*ad collegendum*) heretofore granted, and to grant administration to the public administrator.[1]

1879.

Thompson
v.
Graham.

*THOMPSON, EXECUTOR, &C. v. GRAHAM AND OTHERS.

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This court has jurisdiction to set aside and cancel deeds and other instruments fraudulently obtained, and which are attempted to be set up inequitably. Where one of the executors renounces the execution of the will, the other executors may file a bill in their own name, and if it is necessary to bring the executor who refused to accept the trust, before the court, he may be made a party defendant.

THIS cause was submitted on bill and demurrer. The Feb. 3d. facts are sufficiently stated in the opinion of the court.

[1] All doubt on the subject of subscribing and attesting wills are removed by statute. See R. S. (4th ed.) 246, sec. 33.

1. The statutes require that the testator must subscribe his name at the end of the will. 2. Such subscription must be made in the presence of each of the attesting witnesses, or acknowledged by the testator to have been so made, to each of the witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament. 4. There must be at least two subscribing witnesses, each of whom shall sign his name at the end of the will, at the request of the testator. See also *Brinckerhoof v. Remsen*, 8 Paige, 491; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 86; *Nelson v. McGriffert*, 3 Barb. Ch. 158; *Rutherford v. Rutherford*, 1 Denio, 35; *Tonnale v. Hall*, 4 Comst. 140.

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Thompson
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Graham.

THE CHANCELLOR:—It is well settled that this court has authority to set aside an order to be delivered up and cancelled, deeds or other instruments fraudulently obtained, and which are attempted to be set up inequitably. The defendants in this case procured, without consideration, a release from an executor who had renounced the execution of the will, and who is now insolvent; under an express agreement that it should not be used against the other executor, who had proved the will, unless such executor should assent to such release. The object of the defendants was to commit a fraud upon other creditors, by including them to compromise, on the supposition that the holders of this debt had assented thereto. And they now attempt to use it for the purpose of defeating the claims of the acting executor, who knew nothing of the circumstances; and who as it now appears, the defendants also intended to defraud. This is a case where this court has concurrent jurisdiction with a court of law. And the objection raised by the demurrer, on the ground of want of jurisdiction, cannot be sustained.

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Neither is the objection, that Spencer should have been made a party complainant instead of a defendant, well taken. He is insolvent and refuses to execute the trust of an executor, and the complainant had no right to commence a suit in his name without his consent. The only remedy in such a case, if he is a necessary party, is to make him a defendant. *His refusal to prove the will and act as executor is substantially a refusal to join as complainant in the suit.

The demurrer in this cause must therefore be overruled with costs.

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James

v.

Vanderheyden

JAMES AND BLAKE v. VANDERHEYDEN AND ANOTHER.

It is essential to an escrow that it be delivered to a third person to be delivered to the obligee or grantee upon the happening of some event, or upon the performance of some condition.

Where a bond and mortgage and deed were delivered to a third person to be kept by him during the pleasure of the parties, and subject to their further order, held that the papers were not escrows, and that he was a mere depositary.

IN January, 1823, S. Vanderheyden, deceased, and the Feb. 3d plaintiff Blake, entered into a written agreement, by which the latter agreed to sell to the former a farm in Saratoga for \$6,000. Blake was to convey the farm freed and discharged from every incumbrance or lien, judgment or demand of every kind, in law or equity, with covenants of warranty as to the title and the quantity of land contained in the farm; and the purchaser was to secure \$4,500 of the purchase-money, by bond and mortgage on the premises, payable in eight years from the date of the mortgage with annual interest, and give his obligation for the remaining \$1,500, payable in goods in three annual payments from the date of the obligation. About the 1st of March, 1823, under the supposition that the agreement would be carried into effect, Vanderheyden contracted with J. Adams to let the farm to him, and he went into possession soon after that time, and has remained there ever since. At the time of the agreement, J. Thompson held a mortgage and judgment against Ring, the former owner of the farm, for about \$4,000, which were liens thereon, and Blake was not able to complete the title, in consequence of not being able to raise the money to pay off these incumbrances. Both parties being anxious to consummate the purchase with the least possible delay, and Vanderheyden being at Saratoga with his wife, on the 5th of April, 1823, *the deed and bonds and mortgage were drawn and acknowledged, and

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James
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Vanderheyden

at the suggestion of R. M. Livingston, an attorney, left in his hands as "escrows," with written instructions; and to be kept by him subject to such order of the parties as should arise out of any subsequent agreement between them. Livingston also testified that it was the understanding of the parties at the time the papers were drawn, that the deed and mortgage should be recorded. After the papers were completed and ready for delivery, Vanderheyden brought them to Livingston, together with a written memorandum, signed by both parties, in the words following:

"Be it remembered that R. M. Livingston, Esq., has received of Robert Blake and Samuel Vanderheyden, as escrows, the following papers, to wit, a deed from Robert Blake to Samuel Vanderheyden, conveying the Ring farm, (so called;) a bond and mortgage for \$4,500; a bond conditioned for the payment of \$1,500 worth of goods given by the said Samuel; which said several instruments it is hereby agreed that R. M. Livingston, Esq., shall hold as escrows during the joint pleasure of the said Robert and Samuel, or their legal representatives. S. VANDERHEYDEN.

"Saratoga, April 5th, 1823. R. BLAKE."

About three weeks after the papers were left in the hands of Livingston with this written memorandum of the parties, he carried the deed and mortgage to the clerk's office and had them recorded. Nothing was done by Blake towards removing the incumbrances from the farm, or consummating the bargain previous to the death of Vanderheyden in November thereafter. In the fall of 1823, Vanderheyden was applied to by Adams for a written agreement respecting the occupation of the farm; but he declined giving one at that time, on the ground that the bargain between him and Blake was not yet completed. Vanderheyden died without children, but leaving his wife then *eniente* with the defendant S. D. Vanderheyden, who was born some months after the death of his father. The executors named in the will of S. Vanderheyden renounced the execution thereof, and the validity of the will was a long time in contest between

the widow and collateral kindred of the deceased; and administration with the will annexed was finally given to the widow *in the spring of 1826. In March, 1824, Livingston delivered up the bonds and mortgage to the complainants, on receiving an agreement from James to pay off the incumbrances which Thompson held against the farm; and Blake thereupon assigned the bonds and mortgage and all his interest in the mortgaged premises to James, to secure the payment of a note upon which the latter was his indorser at the bank. James, finding there were other incumbrances on the farm, instead of paying up and discharging the mortgage and judgment held by Thompson, advanced him the amount and took an assignment of his claims. He afterwards offered to assign these incumbrances to the administratrix, or to discharge them if she preferred that course; but she declined doing anything on the subject.

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v.
Vanderheyden

The complainants thereupon filed their bill in this cause, without any allusion to the agreement of January, 1823, but setting out an agreement materially different for the sale of the premises, alleged to have been made on the day of the date of the deed and mortgage, and praying a foreclosure and sale of the mortgaged premises, and the payment of the balance of the bonds out of the estate of Vanderheyden, and for general relief. The defendants, by their answer, denied the validity of the deed and bonds and mortgage, and set out the agreement of January, 1823, and insisted that the title to the farm was defective; and setting out various incumbrances besides those assigned to James by Thompson, which they insisted were liens on the premises. The cause was heard on pleadings and proofs.

J. King, for the plaintiffs.

A. Van Vechten, for the defendants.

THE CHANCELLOR:—The writings left in the hands of Livingston, although called by him and the parties escrows,

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Vanderheyden

were not so in fact. It is essential to an escrow that it be delivered to a third person, to be delivered by him to the obligee or grantee, upon the happening of some event or the *performance of some condition, from which time it becomes an absolute deed.[1] But whether we are confined to the written agreement signed by the parties and deposited with the papers, specifying the conditions on which they were left with Livingston, or are permitted to resort to the parol conversations and declarations of the parties previous to the execution of that paper, there is no evidence that they ever intended to authorize him to deliver up the papers to either party without some further directions from both. He swears that he proposed they should leave the papers with him as "escrows," and that they should leave with him written instructions relative to the manner in which he was to dispose of them; and that they should be kept by him subject to such order of the parties as should arise out of any subsequent agreement between them. He drew several memorandums specifying the terms, but Vanderheyden rejected the whole, and finally drew for himself the one now before the court. This was

[1] *Kiersted v. Avery*, 4 Paige, 9; *Johnson v. Callin*, 2 John. Ch. 248; *Gilman v. Church*, 15 Wen. 656; *Johnson v. Baker*, 4 Barn. & Ald. 440; 4 Kent. 454. Such delivery must be to a stranger, and not to one of the parties. 10 Smeed. & M. 9. The presence nor express assent of the grantee is not necessary. *Merrills v. Swift*, 18 Conn. 257; see also *Tompkins v. Wheeler*, 16 Peters, 106; *Wesson v. Stephens*, 2 Ired. Eq. 557. Such assent will be presumed, from the beneficial interest of the grantee in the deed, unless a dissent is proved. *Lady Superior, &c. v. McNamara*, 3 Barb. Ch. 375.

"An escrow," says Chancellor Kent, "is only a conditional delivery to a stranger, who is to keep the deed until certain conditions are performed, when he is to deliver it to the grantee. Until the conditions are satisfied the estate does not pass, but remains in the grantor. It becomes absolute from the time of the second delivery: but this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery. Thus, if the grantor was a *feme sole* when she executed the deed, and she married before it ceases to be an escrow by the second delivery." 4 Kent. 454.

probably signed by the parties at the time they signed the other papers. Livingston was not present, and never saw the parties together afterwards. It would, therefore, be a dangerous species of evidence to substitute his belief of what the parties intended, derived from their previous conversations, for this written and formal declaration of their intent. It is probable that Vanderheyden supposed there were no other incumbrances on the farm than those in the hands of Thompson ; but that was not sufficient to authorize the witness to infer an agreement that he would take the title subject to all others which might be discovered before the agreement was actually completed, and look to the personal responsibility of Blake for his indemnity. The written memorandum shows that the papers were left with Livingston as a mere depository, and that it was not intended they should become absolute deeds without the farther consent of both parties authorizing a delivery as such. Livingston swears that Vanderheyden came to him alone, and brought the papers and written agreement in their present situation, and that he also directed him to have them recorded. In this he is partially supported by the imperfect recollection of his wife. On the other hand, Dr. Douglass and D. Buel, junior, *testify that Livingston told them he put the papers on record of his own accord. It is not material to decide which is right in this particular. After the lapse of three or four years, he may very honestly have substituted the declarations of the parties when they were together at the drawing of the papers, for a supposed direction given to him by Vanderheyden at the time they were left in his hands. In either case, he would be likely to leave them to be recorded, unless there was some express prohibition ; but in neither case would it alter the nature of the transaction as between the parties. Livingston himself swears that he supposed the recording the papers would not alter the rights of the parties, and therefore he made no suggestion that it would be improper. The other parties undoubtedly acted on the same supposition,

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and Vanderheyden particularly, as, notwithstanding any directions he might have given as to the recording, he was so careful as to indorse the word "escrow" on the back of each instrument. This clearly shows he never intended the papers to operate as absolute deeds without some further agreement or understanding between him and Blake. Admitting, for a moment, that the recording of these papers would at law give them a different effect from what was intended by the parties, surely a party who comes into a court of equity for relief cannot be permitted to gain any advantage from that mistake.

This is not the case of a *bona fide* purchaser of the legal estate, without notice of a latent equity which is attempted to be set up to defeat his title. James in this case is in no better situation than Blake. He is the assignee of a chose in action, with sufficient notice to put him on inquiry. He has not been injured by any mistakes of the other parties, as he took the assignment to indemnify himself against a pre-existing responsibility. Under the assignment from Blake he has all the legal title to the farm which Blake had; and it would be inequitable to compel the representatives of Vanderheyden to take an incumbered farm or a defective title, and look to the responsibility of Blake, who has left the state, and is probably insolvent.

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*The complainants dare not even pay off the incumbrances which have been assigned to them, because they see that the lien of Knickerbacker's judgment would then attach upon the whole farm, as it does now upon the surplus value over and above those incumbrances. Those incumbrances are about three-fourths of the value of the farm, and it will be necessary to foreclose the mortgage and sell on the judgments, or buy off Knickerbacker's lien, before a good title can be had. This is an expense which at all events ought to be sustained by Blake, and not by the defendants.

But there is also a failure of title as to forty acres of the farm. More than twenty-five years ago, G. Seymour purchased this forty acres of Andrews, who was in possession

claiming title, and paid \$1,000 for the purchase-money. Seymour went on to the same and died there, leaving his widow in possession with her infant daughter. The widow married Lee, who came on to the farm with her, and afterwards, without any right, sold the forty acres to St. John or Tull, from whom Davis purchased. Ring purchased of Davis, and Blake of Ring. This testimony would be sufficient to enable the daughter of Seymour to recover in ejectment against any one deriving title under Blake. It is not material to inquire whether there is sufficient evidence of the loss of the deed to Seymour. He paid the consideration money, and was entitled to a deed, and under the circumstances it may probably be presumed. But even if the legal title still remains in Andrews, it is out of the complainants, and renders their title to the forty acres equally defective. I am therefore satisfied it would be inequitable and unjust to enforce these bonds and the mortgage against the defendants before a perfect title can be made to the farm, and free from all incumbrances.

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v.
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If the complainants can satisfy these outstanding claims and clear the premises, they may perhaps even now be entitled to a specific performance of the original agreement of January, 1823; but on this question I have not formed any definite opinion. This bill is not properly framed for such relief in this suit, because no such agreement is set out, but one entirely different. If the complainants intend to avail themselves of that agreement hereafter, they are at liberty to have this bill *dismissed with costs, but without prejudice to their right to file a new bill for that purpose.

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But there is one kind of relief which the complainants are entitled to, if they prefer to abandon the contract of January, 1823. The deed and mortgage remaining on the records of the county are a cloud upon the title: they are therefore entitled to a decree declaring the deed and mortgage void and inoperative; and if they abandon the contract of sale, they will be entitled to an account of the rents

1829.

Smith
v.
Smith.

and profits of the farm while it has been in the possession of Vanderheyden or his tenant, after deducting therefrom the defendant's costs in this suit to be taxed.

I. W. SMITH v. A. SMITH AND G. CLARK.

The time for bringing appeals from the equity courts being regulated by rule, the Chancellor, on sufficient cause being shown, may dispense with the rule and enlarge the time.

This court alone has the power to suspend the operation of the rule, and give relief in such a case.

Where a creditor, having a judgment lien upon property, agreed with the vendor and purchaser to relinquish it, and take an assignment of the mortgage given for the purchase-money in lieu thereof, he is entitled to satisfaction of the mortgaged premises, to the extent of his judgment lien, in preference to an equitable claim of off-set in behalf of the mortgagor, which has subsequently arisen.

Feb 6th.

THIS was an appeal from an interlocutory order of the Equity Court of the eighth circuit, ordering a conditional dissolution of an injunction. The defendant Clark was the assignee of a bond and mortgage given by the appellant to A. Smith, and the injunction restrained him from proceeding to sell the mortgaged premises under the statute. The appellant used due diligence for the purpose of entering his appeal within the time prescribed by the rule of this court, but in consequence of the remoteness of the residence of the circuit judge from the clerk's office, the necessary certificate was not procured until the evening of the last day for appealing. The solicitor for the appellant went immediately to the clerk's office to file the same and enter the appeal, but finding the office shut, he entered the appeal and made the necessary deposit the next morning. An application was made to this court for leave to the appellant to proceed on the appeal, notwithstanding the ex-

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piration of the 15 days, and that the injunction be revived until the decision of this court.

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Smith.
v.
Smith.

The Chancellor held, that as the time for appealing was regulated by a rule of this court, the rule might be dispensed with, and the time enlarged on sufficient cause being shown; and that this court alone had the power to dispense with the rule, and give relief in such a case. He directed that the appeal should be deemed to have been entered in time, and that the injunction should be revived until a hearing of the appeal on its merits.

The appeal was noticed for hearing on the next motion day, and was submitted without argument.

J. Dixon, for the appellant.

G. C. Bronson, (attorney-general,) for respondent.

THE CHANCELLOR:—The bill charges that Clark is not a *bona fide* assignee of the bond and mortgage, but took it subject to the equitable claim of the appellant under the bond given to secure to him the enjoyment of the good will of the practice, which he purchased at the time the bond and mortgage was given. The answer, which in this respect must be considered as responsive to that charge in the bill, alleges that Clark had a judgment lien on the mortgaged premises, which he agreed to relinquish, on condition that the bond and mortgage should be assigned to him to secure the debt; and they were delivered over to him accordingly, immediately after their execution. This equity of the defendant Clark is prior in point of time to any which the appellant can have on account of a breach in the condition of A. Smith's bond to him. As between equal equities, the maxim *qui prior est in tempore potior est in jure*, applies. If, in addition to this, the party having the prior equity has also the legal right, it would be contrary to the settled principles of this court to interfere and deprive him of it.

1829

Case
v.
Abeel.

*The amount of the instalment now due is less than the judgment lien which Clark relinquished at the time the bond and mortgage were given. The circuit judge was correct in requiring payment of that amount as a condition of the continuance of the injunction. The decretal order must be affirmed with costs; and the injunction must be dissolved, unless the conditions of that order are complied with in thirty days from this time. And the cause must be remitted back to the equity court, to be further proceeded in there.

CASE AND WIFE v. ABEEL, EXECUTOR, &c.

A surviving partner has the legal right to the partnership effects. But in equity he is considered merely as a trustee to pay the partnership debts, and to dispose of the partnership property for the benefit of himself and the estate of the deceased partner.

He cannot derive any exclusive profit from the use of the partnership funds. An executor or trustee cannot purchase the trust property from his co-executor or trustee without being liable for the profits arising from the property purchased.

It is the duty of executors and trustees to keep the trust fund separate and distinct from their private funds.

If they use the trust funds or mix them with their private funds, they will be made liable for all losses which may arise from their neglect or mismanagement.

Feb. 17th.

THE defendant, Garret Abeel, and his brother John, were partners in the hardware business in the city of New York, for several years previous to the death of the latter, which took place in the spring of 1811. About two years before the death of John, he made his will, and thereby adopted his niece, now the wife of R. D. Weeks, and Mrs. Case, one of the plaintiffs, and two children of Phebe Howell, as his children; and devised and bequeathed unto them in equal shares, all his estate, real and personal, with some few exceptions. There was a limitation over of the

share of either who should die without issue, to the survivor or survivors; and with remainder over to the nephews and nieces of the testator, if all his adopted children should die without issue. He also gave to Phebe Howell an annuity of \$100, during the pleasure of *his executors, or the survivor of them, with authority to the executors to increase the yearly allowance to her, in their discretion. After giving a few other specific and pecuniary legacies, the testator directed his executors to convert his personal estate into money, and with the proceeds thereof to purchase \$3,000 of stocks, and put out the residue at interest, on bond and mortgage; upon real security. They were further directed to pay the pecuniary legacies and the annuity to Phebe Howell, and maintain and educate the adopted children out of the interest; and to pay them their respective proportions as they severally came to the age of twenty-one years. In the meantime he directed the real and personal estate to be vested in the executors, or the survivor of them, for the purposes of the will; and gave them five per cent. on the income of the estate, for their care and trouble in the management thereof. By a codicil, made in 1810, reciting that Phebe Howell was then pregnant, the testator directed the executors to maintain and educate the child out of the estate, in the same manner as the other children adopted by him in his will, and pay it \$500 out of his estate as a portion, if it should live to the full age of twenty-one years. The child was born in due course, and is John H. Abeel, one of the defendants in this suit. The niece, Mrs. Weeks, was of age on the 28th of May, 1823, and Mrs. Case, on the 28th of December, 1826. The testator died on his passage from Rio Janeiro, and the news of his death was received in New York about the first of July, 1811. Whereupon Garret B. Abeel proved the will, and shortly afterwards the other executor also obtained probate thereof; but the latter never intermeddled with the estate except to settle the partnership transactions with his co-executor. He died pending this suit: no part of the

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estate came to his hands, and nothing was claimed against him.

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In February, 1827, the plaintiffs filed their bill in this cause, for an account and settlement of the estate, in which they charged that the acting executor continued to trade with the partnership funds, and made large profits therewith; that he did not put out the moneys at interest as directed by the will, but kept the same in his own hands, except very small portions *thereof, for the purposes of trade; and loaned out other sums to his friends and connections at low rates of interest, and neglected to collect the interest and re-invest the same, &c.

The defendant, Garret B. Abeel, in his answer, admitted that he continued to trade with the partnership stock in trade, and made a profit by its rise in value. But alleged that by the advice of counsel, he took an inventory of the partnership stock, as it existed on the first of July, 1811, when the partnership was published as dissolved; that it was submitted to several respectable merchants and dealers in hardware and iron mongery, who examined the inventory, and estimated the value of the articles; that they decided that 33 1-3 per cent. should be added to the cost of such articles as were charged at sterling prices, and those articles which were charged at currency prices should be estimated at the prices at which they were charged, as their fair value. That such valuation was adopted by him and his co-executor as the fair and just value of the articles; that it was expressly agreed, or clearly understood between them, that he should retain the whole of the stock at that valuation. That the estate of John Abeel was thereupon, on the first of July, 1811, credited by him with one-half the amount at which it was valued, after deducting the balance due to Garret B. Abeel on account of his stock in trade at the time he took John into co-partnership, with interest thereon. And that the stock in trade was not sold at auction because the executors, under the advice of counsel, did not conceive it necessary; and because he was will-

ing to take it at its full value, and to allow more for it than any other person would do. He admitted the receipt of the rents and profits of the real estate of the testator, and that he received several sums on the sale thereof under proceedings in partition; but denied that he had kept money in his hands to answer the exigencies of his business, or that the moneys were not put out for the best rates of interest that could be obtained. That he had kept an interest account from the first of July, 1811, and allowed the estate lawful interest on all sums which had come into his hands, and he believed *he had allowed more interest than he was bound to do. It appeared also by the answer of Garret B. Abeel that after Mrs. Weeks became of age, he set apart \$10,000 for the support of Phebe Howell and her son, and to pay the \$500 legacy to the latter, if he attained the age of twenty-one, which he insisted he was not bound to render an account to the complainants of at this time, or in this suit. He also admitted that he kept no separate account in bank of the moneys belonging to the estate, but that the same was placed to his own credit, and the credit of himself and partner, and used by them occasionally in the course of their business. The other defendants having put in their answers, the cause was heard on the bill and answers as to them, and on pleadings and proofs as to the acting executor

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S. A. Foot for complainants:—The defendant, Garret B. Abeel, is bound to account to the complainants for the profits of the partnership property, notwithstanding the arrangement between him and his co-executor to take the same at the valuation of the merchants who were applied to to appraise it. Abeel should have sold the partnership goods, and invested the portion belonging to the estate of his deceased partner. He stood in the character of trustee, and could not purchase from his co-executor. He made an extra profit upon the partnership goods, in consequence of the non-intercourse act and the war with Great Britain.

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C. Baldwin, for defendants:—The defendant was not compelled to sell the partnership property. If he had sold it at public auction he could not have bid himself, and the property might have been sacrificed. The present is unlike the cases cited by the opposite counsel. (Toller, 238.) If an executor pays a debt of the testator, he may take and retain any specific chattel at its value, if not more than sufficient to discharge his debt. If a personal chattel of the testator is sold for debt, the executor may purchase at the sale. (Lee v. Brown, 4 Ves. 369; Howe v. Earl of Dartmouth, 7 Ves. 150.) If application had at that time been made to the Chancellor, he would have permitted the defendant to take the goods at a fair valuation. In this case

it is impossible there should be a resale. The severe rule that a trustee cannot purchase, ought not to be encouraged.

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THE CHANCELLOR:—The first point presented by the pleadings and proofs in this case is, whether the acting executor is to be permitted to account for the partnership stock at the price fixed upon by himself and his co-executor.

I took up the case with a sincere desire to sustain the agreement or understanding upon which A. B. Abeel assumed to himself the sole ownership of the stock in trade, but I find it cannot be sustained without overturning principles of equity which have long been deemed essential to protect the rights of those whose property is committed to the care or guardianship of others. These principles are discussed at length in *Defoe v. Fanning*, (2 John. Ch. Rep. 252;) in *Rogers v. Rogers*, (1 Hopk. 515;) and in *Hawley v. Cramer*, (4 Cowen, 717.) It is therefore sufficient merely to advert *to these general principles here. The surviving partner has the legal right to the partnership effects;[1] but in equity he is considered merely as a trustee to pay the partnership debts, and dispose of the effects of the concern for the benefit of himself and the estate of his deceased partner. He cannot therefore be permitted to make any gain or profit by the use of the partnership funds and effects for his own exclusive benefit. In this case, if the surviving partner had not stood in the situation of executor, he might have made a valid agreement with the personal representatives of his deceased brother, to take the stock on hand at a fixed valuation; and whatever profit was made upon the bargain would have been his own exclusively. But one executor or trustee can make no valid agreement to purchase, or take the trust property at a fixed valuation from his co-executor or trustee, without being liable for the profits, if any are made by the agreement.[2] It follows from these principles that the com-

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[1] *Murry v. Mumford*, 6 Cow. 441; *Van Kuren v. Parmelee*, 2 Comst. 523.

2] As to the general principal that a trustee, executor, agent, or other

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plainants would be entitled to an account of the profit made by the increased value of the stock in trade, in the

person acting in a fiduciary character, cannot become a purchaser for himself, or otherwise derive a private benefit from the disposal and management of trust property or funds, or from the peculiar relation in which he stands as a trustee. See *Wedderburn v. Wedderburn*, 2 Keen, 722; S. C., 4 M. & Cr. 41; *Anon.*, 2 Russ. 350; *Shaw v. Rodes*, id. 539; *Lees v. Nuttall*, 1 Russ. & M. 53; S. C., 2 M. & K. 819; S. C., Taml. 282; *Docker v. Somes*, 2 M. & K. 664; *Taylor v. Salmon*, 4 M. & C. 139; *Green v. Winter*, 1 John. Ch. 26; *Packist v. Alexander*, id. 394; *Holbridge v. Gillespie*, 2 id. 30; *Hart v. Ten Eyck*, id. 104; *Davoue v. Fanning*, id. 257; *Schieffelen v. Stewart*, 1 id. 620; *Duncomb v. Duncomb*, id. 510; *Brown v. Ricketta*, 4 id. 305; *Moor v. Froud*, 3 M. & C. 45; *Stiles v. Burch*, 5 Paige, 134; *Reed v. Warner*, id. 650; *Hawley v. Cramer*, 4 Cow. 717; *Van Epps v. Van Epps*, 9 Paige, 238; *Quackenbush v. Leonard*, id. 334; *Torrey v. Bank of Orleans*, id. 663; *Smith v. Langford*, 2 Beav. 362; 1 Story's Eq. sec. 316, 465; 1 Liv. Agency, 422, 425; Hill on Trustees, 379.

In *Docker v. Somes*, 2 Mylne & Keen, 664, it was decided that, if a trustee mixes trust funds with his private moneys, and employs both in trade for his benefit, the *cestui que trust* may insist on a proportionate share of the profits, if he prefers it instead of interest on the amount of trust funds so employed. Lord Brougham, on this occasion, delivered the following judgment, which strikingly exemplifies the rule in the text. "Whenever a trustee, says his Lordship, or one standing in the relation of a trustee, violates his duty and deals with the trust estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go, not to the trustee who has so applied the money, but to the *cestui que trust*, whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though loss, if any must fall upon himself; yet, for every farthing of profit he may make, he shall be accountable to the trust estate. So, if he lay out the trust moneys in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure, or from the concern. In all these cases it is easy to tell what the gains are. The fund is kept distinct from the trustees, other moneys and whatever he gets he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. So it is also, where one not expressly a trustee, has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable. If a person has purchased

hands of the acting executor, if it could be ascertained. But the stock in trade of the partnership having been mixed with other goods of the defendant, and sold out by

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land in his own name with my money, there is a resulting trust for me; if he has invested my money in any other speculation, without my consent, he is held a trustee for my benefit. And so an attorney, guardian, or other person, standing in a like situation to another, gains not for himself, but for the client, or infant, or other party, whose confidence has been abused. Such being the undeniable principle of equity, such the rule by which breach of trust is discouraged by intercepting its gains and thus frustrating the intentions that caused it; punished by charging all losses on the wrong-doer, while no profit can ever accrue, can the court consistently draw the line, as cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent; those instances where the trustee is most likely to misappropriate; namely, those in which he uses the trust funds in his own traffic? At first sight, this seems grossly absurd. Some reflection is required to understand how the court could ever, even in appearance, countenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only, I take to have been this. They could not easily sever the profits attributable to the trust money, from those belonging to the whole capital stock; and the process became still more difficult where a great proportion of the gains proceeded from skill or labor employed upon the capital. In cases of separate appropriation, there was no such difficulty; as, where land or stock had been bought, and then sold again at a profit. And here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where having engaged in some himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied, from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavoring to ascertain what profit had been really made, to fix upon certain rates of interest, as the supposed measure or representative of the profits, and assign that to the trust estate. This principle is undoubtedly attended with one advantage; it avoids the necessity of an investigation of more or less nicety, in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and expediency are made for this convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation; all profit equally whatever may be the real gain derived by the trustee from this breach of duty; nor can any amount of profit made, be reached by the court, or even the most moderate rate of mercantile profit that is the legal rate of interest, be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound in-

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retail at different periods, those profits cannot now be ascertained.

Under these circumstances, I should still be disposed to let the original valuation stand, if I had not reason to be-

terest; and this without the least regard to the profits actually realized. For, in the most remarkable case in which this method has been resorted to, (*Raphael v. Boehm*, which is indeed always cited to be doubted, if not disapproved,) the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it. But the principal objection which I have to the rule, is founded upon its tendency to cripple the just power of this court, in by far the most wholesome, and, indeed, necessary exercise of its function, and the encouragements thus held out to fraud and breach of trust. What avails it towards preventing such malversation that the contrivers of sordid injustice feel the power of the court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores?

It is in vain, they are told, of the court's arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralyzed or shrunk up. The distinction I will not say, sanctioned, but pointed at by the negative authority of the cases, proclaims to executors and trustees that they have only to invest the trust money in the speculations, and expose it to the hazards of their own commerce, and be charged 5 per cent. on it; and then they may pocket 15 or 20 per cent. by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication, is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction. Even if cases were more likely to occur, than I can think they are, of inextricable difficulties in pursuing such inquiries, I should still deem this the lesser evil by far, and be prepared to embrace it. Mr. Solicitor-General put a case of a very plausible aspect, with a view of deterring the court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with 100*l.* of trust money, and earning 1,000*l.* a year by selling them to his patients; and so he might have taken the case of trust money laid out in purchasing a piece of steel or skein of silk, and these being worked up into goods of the finest fabric, Birmingham trinkets or Brussels lace, where the work exceeds by 10,000 times the material in value. But such instances in truth prove nothing; for they are cases, not of profits upon stock, but of skilful labor very highly paid; and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit; although the refinements of the civil law would certainly bear us out, even in charging all gains accruing upon those goods as in the nature of accretions belonging to the true owners of the chattels."

lieve there was some mistake in the estimate then made. The witnesses speak of the value of such kinds of goods in the middle of the year 1811; and the estimate of Duryea and Mowatt was undoubtedly made with reference to the state of the market on the 1st of July in that year, when the partnership was advertised as dissolved by the death of John Abeel. But it is certain the surviving partner did not at that time determine to take the goods on hand at the valuation of Duryea and Mowatt.

It is true, he says in his answer, that half the stock in trade was credited to the estate on the 1st of July, 1811. But, by adverting to the testimony and exhibits, it is evident he did not mean to say he had at that time concluded to take the property, and actually credited the estate with its proportion *on that day. He came to that conclusion some time afterwards, and then credited the same as the 1st of July, 1811. He had not determined to take it at that valuation when the opinions of Mr. Riggs and Mr. Harrison were obtained, on the 6th and 10th of August. Soon after these opinions were taken, they commenced inventorying the goods. Dunscomb says it was a long and tedious business, and that they were engaged a month or six weeks in doing it. After this inventory was completed, Duryea and Mowatt made their valuation. They undoubtedly made it with a reference to the state of the market on the 1st of July preceding, as the surviving partner acted under the erroneous impression that he was entitled to retain the stock at its then value. Under this impression he very honestly credited the amount to the estate as of that date, that the interest might commence from that time. But in this he acted under a mistake as to his equitable rights. It does not distinctly appear at what time he did finally conclude to take the goods, and charge the amount to himself in his account with the estate. But by adverting to the history of the times, it is pretty evident that the value of the stock had been enhanced between the first of July and the completion of the inventory; or, at

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least, that circumstances had so changed that an advance in the price of such articles might be reasonably expected.

The proclamation of the president, announcing the revocation of the Berlin and Milan decrees, was issued on the 2d of November, 1810; of course the non-intercourse act went into operation against Great Britain on the 2d of February thereafter. In the intermediate time it is probable considerable importations of hardware and iron mongery were made. This circumstance, in connection with the fact that it was generally supposed Great Britain would repeal the orders in council, would for a time keep down the value of that description of goods, although fresh supplies could not be immediately obtained. The last information received from the British cabinet, previous to the close of the session of Congress after the intercourse was stopped, was a declaration from the minister that the British system would be *abandoned as soon as the repeal of the French decrees had actually taken place. But in the course of the summer of 1811, the prospect of obtaining fresh supplies from England was materially changed. It was officially known that instead of repealing the obnoxious orders, Great Britain had enforced them more rigidly; and Commodore Rogers had been compelled to chastise the insolence of one of her naval officers, in attempting to execute those orders; on which occasion blood was shed. On the 24th of July, the president called a special meeting of Congress, to take place early in November; towards the close of which session it is well known war was actually declared. From the time when this special meeting of Congress was called, a war with England, or a much longer continuance of the non-intercourse system at least seemed inevitable. A very considerable advance in the value of hardware and iron mongery must, therefore, have been anticipated before the inventory of the goods in question was completed. Notwithstanding this great change in our commercial relations with Great Britain, the currency goods, more than five-sixths of the value of the whole stock of the partner-

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ship, were estimated at the original cost. It also appears from the inventory that at least \$30,000 of the currency goods was in rolled and bar iron, steel, anchors and anchor palms, share moulds, nail rods, and other articles of that description, which could not be very materially injured by lying on hand. And the actual value of those articles could readily have been ascertained, without reference to the original cost. The witnesses in this case may not have succeeded in conveying their real meaning. Possibly the currency price is a nominal value put on the articles, from which a deduction was made on the original purchase. But as I understand the testimony, these goods were estimated at the original prices paid for them on the purchase, without any addition for commission or importation charges. Whether the \$6,768 worth of stock actually sold by the surviving partner, before the inventory was completed, is estimated at the original cost, or put down at the price for which the goods actually sold, does not appear.

*There must, therefore, be a new valuation put upon the stock in trade on the first of October, 1811, which is probably full as early as the time when the acting executor assumed the absolute ownership of the property. The valuation must also be made in reference to the nature of the particular stock on hand, and the then existing and probable relations of the country; and the good will of the business must also be taken into consideration. The goods sold before that time, as mentioned in the inventory of currency goods, must be separated therefrom; and if estimated at the original costs, must be charged with the additional prices obtained on the sale. Interest must be charged against the acting executor, and the accounts taken upon the principles sanctioned by the last decree of this court and the decision of the Court of Errors in *Clarkson v. De Peyster*, except that in stating the account, the five per cent. allowed to the executors on the income of the estate must be deducted from the interest or income from time to time, and only the balance thereof charged. This account must thus

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be continued up to the time when Mrs. Weeks came of age.

The next question is as to the manner in which the account is to be taken so as to give the adopted children a support out of the general funds of the estate, on principles of equality. If the same expense had been bestowed upon each, the niece, who was much the oldest, would have in fact received a less proportion of the property than the younger children who were to be supported out of it for a much longer period, provided that support was taken from the bulk of the estate, instead of being charged upon the particular share of each. But it was probably in the contemplation of the testator that each should be supported out of her own share, as the executors are directed to pay over their proportions as they respectively arrive at the age of twenty-one. The expenses of each would be greatly increased as they approached the termination of their minority. If the oldest was supported out of the bulk of the estate until twenty-one, and then permitted to withdraw the whole of her share from the fund, great injustice would be done to the younger children; and if this principle is adopted, the *payment of the \$2,500 to Mrs. Weeks as an equivalent for support which was not actually rendered or necessary, cannot be sustained. The executor has acted on the supposition that he was not to bestow an equal expense for the support and education of each child, but was authorized to exercise a discretion in relation to that matter. His niece was about nine years of age at the death of the testator, and she has had expended for her support and education, for the period of twelve years, \$8,545, which is about \$1,500 more than was expended on Mrs. Case for a period of time three years and a half longer. The expenses bestowed upon the two children of Phebe Howell were probably much less. No injustice, therefore, will be done to Mrs. Weeks and Mrs. Case, if the whole amount of their support is charged upon their respective proportions of the estate, leaving the future as well as the past expenses of the

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two infant children of Phebe Howell to be charged on their respective shares of the estate only.

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As the will originally stood, there could be no difficulty in keeping the accounts of each of the children separately. A sum sufficient to raise the annuity to Mrs. Howell should have been set apart for that purpose, and the rest divided into four equal shares and kept separate and distinct. Even after the codicil had provided for the support of another child out of the estate, there would have been no difficulty in setting aside a sufficient sum for that purpose, or, what would have been more simple than either, the executor might annually have charged one-fourth of the support of Phebe Howell and her son to the share of each of the adopted children. In consequence of the manner in which the fund has been kept and managed, it must be extremely difficult to state the account anew from the beginning; but I see no other way of doing justice between the parties.

Executors and trustees must be made to understand that it is their duty to keep the funds of their trust separate and distinct from their other funds and business; that they should, upon no consideration, use the trust moneys themselves, or permit it to be mingled with their own moneys or property. In no other way can they save themselves from trouble, litigation and censure. If they neglect this obvious duty, they *have no reason to complain if they meet with trouble and expense, and sometimes with heavy loss. The protection of the rights of those who are not in a situation to protect themselves, makes it the duty of courts of justice to require fiduciaries to make good all losses which have been occasioned by their neglect.

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As the executor has made a final settlement with Weeks for the share of his wife's estate up to the time when she became of age, no new account need be taken of her share previous to that time. But she will be entitled to an account of the administration of her portion of the \$10,000 set apart for the support of Phebe Howell and her infant son.

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The master must state three separate accounts up to the 28th of May, 1823, when Mrs. Weeks became of age, between the acting executor and Mrs. Case and the two daughters of Mrs. Howell.

In the account with Mrs. Case, the master must charge the executor one-fourth of all sums properly chargeable against him on account of the estate, and interest on the principles before stated, after deducting commissions, and must credit him one-fourth of all moneys expended for the general purposes of the estate, and for the payment of the specific or pecuniary legacies or debts, or for the support of Mrs. Howell or her infant son, and the whole amount expended for the maintenance and education of Mrs. Case, or other expenditures properly chargeable upon her share exclusively. And the accounts between the executor and the two children of Phebe Howell must be taken in the same manner. On the 28th of May, 1823, \$2,500 must be taken from the balance due each, to make up their shares of the \$10,000 fund, appropriated, at that time, for the support of Mrs. Howell and her son. The separate accounts must then be continued upon the balance, in the same manner, except as to the support of Mrs. Howell and her son and the general expenses of the estate, which must, from that time, be charged upon the \$10,000 fund. And a distinct account of the administration of that fund, as between the acting executor and all the adopted children, must be taken by the master. The executor is not to be charged for a greater rate of interest than was actually *received on moneys *bona fide* loaned by him on bond and mortgage. There is no foundation for the charge that he put it out for a rate of interest less than seven per cent. unnecessarily or improperly. His own interest required that he should procure the greatest possible income from that part of the estate which was loaned out on bond and mortgage; and I am satisfied from the testimony that all the loans which were made under seven per cent. were so made in good faith.

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There must be a reference to a master to take and state the account upon these principles and directions; and he must also ascertain and report the situation of the trust fund which is now invested in stocks or on bond and mortgage, and whether the same is properly secured and safely invested. And the question of costs, and other questions and directions are to be reserved.

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GEORGE HALL v. THADDEUS M. WOOD.

Where exceptions to an answer have been allowed, and the defendant on the application of the adverse party, puts in an entire new answer to the bill, the complainant has no right to treat it as an answer to the exceptions only; but if the new answer is insufficient, he must file new exceptions.

Where matters charged in the bill, as the acts of the defendant himself, are of such a nature that he can be presumed to recollect them if they ever took place, a positive answer is, in general, required.

But where the facts are such that it is probable he cannot recollect them so as to answer more positively, a denial of the facts, according to his knowledge, recollection and belief, will be sufficient.

THIS was a case on exceptions to a master's report on ex-
ceptions to an answer. The facts appear in the opinion of
the court. Feb. 17th.

D. W. Forman, for complainant.

S. M. Hopkins, for defendant.

THE CHANCELLOR:—The complainant filed exceptions to the original answer of the defendant, which, on reference to a master, were, in part, allowed. The bill having been *taken as confessed in consequence of the neglect of the defendant to put in a further answer and pay the costs, he applied to be let in to make a defence on affidavits of merits and of mistake, or accident having prevented his

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complying with the former order of the court. The answer being very voluminous, he was desirous of saving the expense of an entire new answer; but the complainant's counsel insisted that if he was let in they were entitled to a new answer, which should be full and complete; and that the defendant ought to be prohibited from setting up the statute of limitations as a defence in the new answer. The court compelled the defendant to submit to these terms; and also required him to pay \$50 over and above the taxable costs to remunerate the complainant for counsel fees and extra expense. The order for taking the bill *pro confesso* was set aside on condition that such costs and extra allowance were paid, and a full and perfect answer put in within forty days. The defendant complied with these conditions, and put in a new answer. Instead of excepting to this answer, in the usual form, the complainant referred it to the master upon the voluminous exceptions taken to the first answer, many, or most of which were wholly inapplicable. The master, without inquiring into the regularity of this proceeding, examined the answer in respect to the exceptions which were allowed by him to the original answer, and certified that the same was a good and sufficient answer to the bill, and that the exceptions ought not to be further insisted on.

The whole of this reference and proceeding before the master has been irregular. The complainant had a right to retain the former answer and proceedings thereon, and to compel the defendant to answer further. The defendant wished to do this, but the complainant insisted upon having an entire new answer. After he had succeeded in this request, and been paid for the intermediate costs, he had no right to treat this as an answer to the exceptions. And if it was an insufficient answer to the bill, he should have filed new exceptions.

Under these circumstances, I have not looked into the new answer for the purpose of determining whether it was a *technical answer to all the exceptions which were allowed

by the master on the reference of the first answer ; but only so far as to see whether the new answer was sufficient in substance. For this purpose the new answer must be examined by itself, and without reference to what was contained in the former answer. And for the purposes of this application it must also be taken to be true.

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The defendant has annexed copies of the accounts, and brought into the register's office the partnership books, from which the complainant may be enabled to obtain all the information which his co-partner, the defendant, possesses on the subject. And he swears that the account given by him is the best he can make or render in the premises, and is as full and complete as he is capable of making it. And as to certain specific inquiries as to sums and amounts, he says he does not know, is not informed, has no means of knowing and cannot answer. If this is true, he certainly could not give a more perfect answer to those particulars without committing perjury.

It is supposed by the complainant's counsel, that he ought to have denied positively that he had within six years received any other sums than those mentioned in his answer. He swears that he did not receive any other sum or sums from any person or persons to his knowledge, recollection, information or belief, and he therefore denies that he did receive any other sum or sums. The objection to the answer in this particular is founded upon one of Lord Clarendon's orders, which is thus stated in Hoffman's Chancery; "An answer to a matter charged as the defendant's own fact, must be direct, without saying that it is to his remembrance, or as he believeth, if it be laid to be done seven years before, unless the court upon exception taken, shall find special cause to dispense with so positive an answer." The exception in the rule takes this case completely out of its operation. Certain facts and transactions make such an impression upon the mind of the defendant, that he is presumed to be able to answer positively whether they were so or not, unless he set forth some reason or excuse, from

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which it may appear possible that the circumstances have escaped his recollection. *A *non mi ricordo* answer, as to such facts, is always considered evasive. But even there compelling the defendant to answer positively, is a measure of doubtful policy, except with a view to a conviction for perjury; for if he had prevaricated in the first instance, he would probably give a positive denial of the fact if compelled to answer further. But in the case now under consideration, the court must see that it is impossible for a man who has been collecting outstanding accounts for many years, to swear positively that he has not received any other sums than those entered on his books of account. A positive answer, in such a case, to a conscientious man, might appear very much like swearing to what he could not know. And upon the exception in Lord Clarendon's order, the court must see special cause to dispense with so positive an answer where there is room to doubt whether the defendant can answer in the manner prescribed by that rule, without doing violence to his conscience. In *Hall v. Bodily*, (1 Vern. 470,) decided since the order of Lord Clarendon, the defendant answered, that he received no more than the sum of £ to his remembrance, and it was held so far a good answer.

On the whole I am satisfied with the decision of the master upon this answer. The exceptions must be overruled, and the report confirmed; and the complainant must pay to the defendant his costs on the reference and upon the hearing on the exceptions to the report.

CASPER J. COOK v. JOSEPH GRANT, ADMINISTRATOR, &c.,
OF HENRY J. COOK DECEASED.

Where a testator devised his real and personal estate to two of his sons, provided they should pay certain legacies given in the will, and the legatees

filed their bill against them and obtained a decree for the sale of the real estate to pay the legacies, which, upon being sold, proved insufficient; and no decree having been asked in that suit, charging the devisees personally with the payment, held, that the legatees could not file a new bill against them for that purpose.

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*The legatees should have asked and obtained all the relief to which they were entitled, against the devisees in the first suit.

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BY the will of John Cook, who died in 1804, he devised Feb. 17th. to his wife, during her life or widowhood, the possession of all his estate real and personal. And after her death he devised the same in fee to his sons John and Henry, in separate and distinct parcels, provided they should pay certain legacies to the complainant and others. In 1815, Henry and his mother sold and conveyed to J. Vosburgh, with warranty, all the lands devised to him by the will, for the consideration of \$3,000. In 1819, the complainant, Casper J. Cook, and the other legatees, filed a bill in this court against the devisees and the purchasers under them, setting forth a payment of part of the legacies, and praying that the devisees and purchasers might pay the residue, or in default thereof that the lands might be sold to pay the same. That bill was taken *pro confesso* against the several defendants therein, by the consent of some, and by the default of the others; and a reference was made to a master to ascertain the amount due to the legatees. On the coming in of the master's report, a final decree was entered in the cause, directing all the devised premises to be sold, subject to the life estate of the mother of the devisees, and that the costs of the suit and balance of the legacies be paid out of the proceeds; and that the residue of the purchase-money, if any there should be, remain in court to abide the future order thereof. Under that decree the complainant bid in all the lands for \$200, which was but little more than sufficient to pay the costs; leaving nearly \$2,000 still due to the legatees. He afterwards obtained assignments of the interest of all the other legatees. After the death of Henry J. Cook, and more than six years after

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the sale, he filed his bill in this cause against the administrator, claiming the balance unpaid on the legacies to be a personal charge against Henry J. Cook, and that he was entitled to a preference in payment out of the estate, on the ground of the decree in the first suit.

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The administrator put in an answer, referring the complainant to such proof as he could make of his case, and leaving *his rights to the determination of the court. The cause was submitted on pleadings and proofs.

H. Loucks & A. Haring for complainant:—The defendant's intestate, by accepting the devise in the will of John Cook, became personally liable for the payment of the legacies given therein to the complainant and his four sisters. The rule is settled that where land is devised, charged with the payment of a legacy, and the devisee accepts the devise, he takes it *cum onere*, and becomes personally liable for the legacy. (*Glenn v. Fisher*, 6 John. Ch. Rep. 33; *Jackson v. Bull*, 10 John. R. 148.) In this case the intestate enjoyed the lands devised to him for several years, and then sold them for \$3,000, and received the consideration money. He has also made payments towards the legacies charged upon the lands. In *Van Orden v. Van Orden*, (10 John. Rep. 30,) it was held that the acceptance and enjoyment of the estate devised, and payment on account of an annuity, was equivalent to an express promise. (*Tole v. Hardy*, 6 Cowen, 333.) The sale of the land devised under the former decree did not discharge the intestate from his personal liability. That decree charged him personally. The money received by the defendant on the Gross bond forms a part of the assets to be administered by him. This bond was taken by the intestate in payment of a bond belonging to his wife. This act of the intestate was a sufficient reduction into his possession of the bond of his wife. It was equivalent to receiving the money due upon it. (*Schuyler v. Hoyle*, 5 John. Ch. R. 196, 207.) But if this bond had not been reduced into possession by the intestate,

he became entitled to it as the administrator of his wife, having survived her. (1 Chit. Pl. 21; *Schuyler v. Hoyle*, 5 John. Ch. Rep. 206, 207; *Whitaker v. Whitaker*, 6 John. Rep. 112.) And although the intestate died without administering upon her estate, still her administrator is a trustee for the representatives of the husband. (*Stewart v. Stewart*, 7 John. Ch. Rep. 229, 244; *Whitaker v. Whitaker*, 6 John. Rep. 112; *Schuyler v. Hoyle*, 5 John. Ch. Rep. 206, 207.)

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The former decree against the intestate being equivalent to a judgment at law, is a debt of record, and is entitled to *priority in payment out of the assets of the intestate. Equity will not destroy priorities which the law gives, although a creditor should be obliged to go into Chancery for assistance. (*Thompson v. Brown*, 4 John. Ch. Rep. 619, 634; *Codwise v. Gelston*, 10 John. Rep. 507; *Woodcock v. Bennet*, 1 Cowen's Rep. 711.) The defendant ought to be charged with costs. Before the commencement of the suit, he was served with a copy of the decree, and a written notice of the complainant's claim; and payment was then demanded from him. (*Glen v. Fisher*, 6 John. Ch. Rep. 38; 7 John. Ch. Rep. Gen. Index, p. 47.)

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S. Beardsley for defendant:—The intestate acquired no title to the lands devised to him, until the payment of the legacies. He could not, therefore, until the legacies were paid, convey any title to a purchaser; and the legatees having applied to Chancery, and obtained a sale of the devised premises to satisfy the legacies, cannot now charge the devisees personally with such legacies. If they had not enforced their claim against the land, they could undoubtedly have charged them personally. (2 Cruis. Dig. tit. *Devise*, ch. 16; *Wheeler and wife v. Walker*, 2 Com. Rep. 197; *Jackson v. Martin*, 18 John. Rep. 35; *Jackson v. Bull*, 10 John. Rep. 151; *Glen v. Fisher*, 6 John. Ch. Rep. 33.) The legatees have deprived the intestate of the gift to him, and they should not now subject him to

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charges made upon the subject of that gift. This distinction is peculiarly proper in this case. For here the widow of the devisor was entitled to the possession during her widowhood; and before that time expired, the legatees proceeded and obtained a decree for the sale of the devised premises, and actually sold the same to discharge the legacies. The former bill filed by the legatees did not seek to charge the defendants personally. Under the decree in that suit, the complainant purchased the devised lands; and he now seeks to claim the legacies also. If the complainant is not entitled to relief, then the defendant should recover his costs against him; and if he is entitled to relief then the defendant ought to have his costs out of the fund.

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*THE CHANCELLOR :—It is not necessary for the decision of this cause, to examine the question whether Henry J. Cook was originally liable for the payment of the legacies charged on the land devised to him. This bill is not framed properly, or with the necessary parties to settle that question here, without reference to the proceedings and decree in the original suit. The only question now is, whether by that decree he was personally charged with the payment of the legacies. The legatees were bound to ask and obtain all the relief to which they were equitably entitled, in the first suit. If they had claimed to charge him personally in that suit, and obtained such a decree, it is hardly probable he would have left the property to be sold for a nominal sum merely. He has paid part of the legacies, and has received nothing under the devise. The life estate of his mother continued till after the sale under the decree. Although he had before that time joined with her in a conveyance of the property, he was bound to refund the whole purchase-money under his covenant of warranty.

On looking into the decree in that case, it is clear that it never was intended to charge the devisees or the purchasers under them, with the payment of these legacies, personally. It is an absolute decree for the sale of the property, and the

distribution of the proceeds only. There is not even an option given to the defendants in that suit to pay the money, or to have the land sold to satisfy the legacies. It is as much personal decree against the purchasers as against the devisees, but it never was intended to be personal against either. The complainants' bill must be dismissed with costs.

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A covenant on the part of the lessor to renew a lease for years at the expiration of the term, is a covenant running with the land.

A surrender and conveyance to the lessor of a sub-lease of part of the premises, is no bar to a claim on the part of the lessee or his assigns for a renewal of the original lease agreeable to the covenant.

The holder of the original lease is not entitled to a covenant for renewal in the new lease, as that would create a perpetuity.

ON the first of November, 1802, Joel Evans leased to Feb. 17th. James Cross a piece of land in the city of New York for the term of twenty years and six months, at a quarter yearly rent. The lessor covenanted with the lessee and his assigns that he or they might, at any time within thirty days after the expiration of the lease, remove from the premises all buildings erected thereon during the said term. Evans also covenanted with the lessee to renew the lease at the expiration of the term, at a fair valuation, by persons indifferently chosen between the parties. In 1803, all the interest of Cross in the premises was sold on an execution, and conveyed by the sheriff to Stevens. In 1804, the right of Stevens was sold and conveyed to J. Drennan. In May, 1805, Drennan sold the premises to T. Garniss and W. H. Pyke, who divided the premises into three lots. They leased No. 3 to J. W. Griffiths and C. Green for the residue of the term, at a yearly rent of \$42 50, and the lessees covenanted to surrender up the premises on the last day of the term. Garniss and Pyke covenanted to pay them for their

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improvements and buildings on the last day of the term, or to suffer the lessees to take them off within thirty days thereafter. They also covenanted, that if they obtained a new lease of the premises at the expiration of the term, they would assign to Griffiths and Green, on the same rent and conditions upon which they should receive such lease. In July of the same year, lot No. 2 was leased by Garniss and Pyke to J. Spies upon the same terms. In 1811, Pyke sold and assigned to Garniss all his interest in the undivided half of the premises. Two years afterwards, Garniss sold and assigned all his interest in the *whole of the leasehold premises to the complainant, and delivered over to him the original lease, with all the intermediate assignments and sub-leases.

In 1821, the defendant became the owner of the reversion and of all the interest which Evans formerly had in the premises, subject to the rights claimed under the lease. After this purchase, the complainant paid to the defendant the rent for the original lease to the end of the term. The defendant endeavored to purchase in the outstanding claims under the original lease, but the parties could not agree as to the terms. A few days before the expiration of the term, the defendant procured from the executrix of Spies a surrender of his sub-lease and a conveyance of all her interest in the premises; which surrender and conveyance, he now insists, is a complete bar to the complainant's claim for a renewal of the original lease.

The bill and answer set out various negotiations between the parties as to the mode of fixing a rent on renewal of the lease, and the persons to be selected for that purpose, which have no bearing on the merits. The cause was heard upon the pleadings and a statement of facts agreed upon by the parties.

R. Bogardus, for the complainant:—The only question in this case is, whether the purchase by the defendant of the sub-lease of a part of the demised premises, is a bar to

the complainant's claim to a renewal of the original lease. At the time the original lease was given, it must have been expected by the parties that the premises would be divided by the lessee, and sub-leased to different persons. The doctrine cannot be sanctioned, that the act of the reversioner in purchasing the interest of one sub-lessee, should take away the right to a renewal of the original lease. The injury that would result to the tenant by a refusal to perform the covenant for a renewal, is the consideration for the execution of a new lease. Not only the covenantor but also his assignees are bound by the covenant of renewal.

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P. A. Jay and W. Slosson for the defendant:—The sub-leases by the complainant, although in form leases, were in fact assignments of all their interest in that part of the demised *premises so sub-leased. There cannot be a lease without a reversion in the lessor. The covenant of renewal contained in the original lease is not devisable. The landlord cannot be compelled to cut up his lands into several parts, by executing several new leases. The covenant is for a renewal of the lease as to the entire whole and not of a part of the demised premises. The covenant is also too vague for a decree of specific performance. No mode is pointed out to ascertain the amount of the new rent, or the time for which the new lease is to run. The Chancellor must make a new contract, in order to render effectual a decree for specific performance. (*Spencer's Case*, 5 Coke's R. 16 a; 1 Saun. R. 287, c. note 16; *Dumpor's Case*, 4 Coke's R. 119, 120; 3 Com. Dig. 128, tit. *Condition*, c. 2; *Soprani v. Skurro*, Yelverton's R. 19.)

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THE CHANCELLOR:—The objection that the covenant to renew contained in the original lease was personal, and did not pass by the assignment of the lease, cannot be sustained. It was a covenant running with the land, and passed to the complainant by the several mesne assignments of the term. It is well settled, even at law, that the

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assignee may recover in his own name for a breach of such a covenant, if the breach was committed after the assignment. (*Lamette v. Anderson*, 6 Cowen, 302; *Wilhey v. Mumford*, 5 id. 137; *Kane v. Sanger*, 14 John. R. 89; *Grescot v. Green*, 1 Salk. 199.) And it lies either for or against an assignee, although he is not named in the covenant.[1] (*Hyde v. The Dean and Canons of Windsor*, Cro. Eliz. 552.) The assignee of a part of the premises may also recover *pro tanto*, if the covenant be in its nature divisible.[2] (*Touchstone*, 199; Co. Litt. 385 a.) A case is mentioned by Gawdy, (Moor, 159,) very similar to this. The lessor of a term for years covenanted to renew at the end of the term, and afterwards granted the reversion; and the assignee of the lease was permitted to maintain an action in his own name for a breach of the covenant against the assignee of the reversion.

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If the defendant in this case had obtained an advantage by procuring the surrender and conveyance of the sub-lease to Spies, as he obtained it with full knowledge of the complainant's *rights, this court would not permit him to retain such advantage. But such is not the fact. The leases to Griffiths and Green and to Spies were strictly sub-leases, and did not convey to them all the interest of the lessors in those particular portions of the premises. The lessors retained an interest in those portions of the premises by the new rent reserved to themselves. They did not give to the sub-lessees an absolute right to take off the buildings which they should afterwards erect. If buildings had been previously erected, the absolute right to them at the expiration of the term belonged to the complainant, if the lessees did not think proper to take new sub-leases; and the right of the complainant to take the

[1] But a covenant in a lease which relates to a thing not *in esse*, but to be done upon the land, does not run with the land so as to bind the assignee, unless he be named in the covenant. *Tullman v. Coffin*, 2 Comst. 134.

[2] *Astor v. Miller*, 2 Paige, 68.

renewal of the original lease in his own name is evidently reserved in the sub-leases.

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The defendant is therefore bound to give to the plaintiff a new lease of the whole premises, and he will then be entitled to a renewal of the sub-lease for lot No. 2, on the terms and conditions specified in the lease to Spies.

As the parties cannot agree upon persons to fix the value of the rent to be inserted in the new lease, it may be fixed under the direction of the court; and the proper sum to be inserted must be ascertained by the report of a master. The other conditions of the lease are sufficiently ascertained by the one originally granted. The new lease must be for a similar term, and with the like covenants and conditions inserted therein, except the covenant for renewal, which the complainant is not entitled to have inserted in the new lease, as that would, in effect, create a perpetuity.[1] (*Fritton v. Foot*, 2 Bro. Ch. R. 636; *Hyde v. Skinner*, 2 P. Wms. 196.) The amount of the rent to be inserted in the new lease must be estimated in reference to the value of the land in May, 1823, without taking into consideration any buildings or improvements made thereon by the original lessee or those who succeeded him in the occupation of the premises.

It would be for the interest of all parties if the defendant should give to the complainant, or to him and Griffith separately, a new lease or leases of lots No. 1 and 3 only, and retain No. 2 himself, with a proportionate reduction of the rent. The amount of the rent may be fixed by *three freeholders, to be selected by such master as may be agreed on by the parties or designated by the court. If the defendant consents to that arrangement, a decree will be entered accordingly, and without costs to either party. Otherwise there must be a decree for a specific performance of the covenant of renewal contained in the original lease, with a

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[1] *Carr v. Ellison*, 20 Wen. 178; see also *Abel v. Radcliffe*, 13 John. 297; but see *Bridges v. Hitchcock*, 5 Brown's P. C. 6. A covenant to renew on such terms as might be agreed on, is void for uncertainty. *Whitlock v. Duffield*, 110; S. C., 26 Wen. 55.

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provision therein for the execution of a sub-lease to the defendant for lot No. 2, and a reference to a master to settle the form of the lease and sub-lease, and fix the amount of rent to be reserved in each. And that the question of costs, and all other questions and directions be reserved until the coming in of the report of the master.

HENRY H. ROSS AND WIFE v. JOHN CRARY, SURVIVING EXECUTOR, &C., OF MARY WILLIAMS, DECEASED.

Where several suits are brought by different legatees for general legacies, and the estate is insufficient to pay them all, the court will direct an account of the estate to be taken in one cause only, and in the meantime direct the proceedings in all the other suits to be stayed.

It is a matter of discretion as to which suit the account shall be taken in. The court will therefore direct the suit which is most beneficial for the legatees to be proceeded in: and if there is doubt on that subject, will refer it to a master to ascertain which suit is most for the interest of the legatees and other persons interested in the estate.

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SEVERAL of the general legatees of Mrs. Williams brought separate suits against the executors to recover the amount of their legacies. The estate being insufficient to satisfy the whole, the defendant applied to have the proceedings in this suit stayed, and that the complainants come in under the decree obtained in one of the other suits which was subsequently commenced.

J. Edwards, for the complainants.'

A. Van Vechten, for the defendant.

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*THE CHANCELLOR:—The opinion of the late Chancellor, in *Kettle and wife and Wynkoop and wife*(a) against the defendant in this cause settles the principle, that where

(a) The following is the opinion of Chancellor JONES above referred to:

KETTLE AND WIFE v. CRARY, EXECUTOR, &C.

THE CHANCELLOR:—This is a bill by legatees against an executor and trustee, for payment of legacies. The defendant, who is surviving executor

there are divers suits for general legacies, and there is an allegation of a deficiency of the fund, so that an account of the estate is *necessary, the court will protect the defendant from unnecessary trouble and expense by

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of the will of Mary Williams, put in his answer, setting forth the will, which contains the bequests to the complainants and numerous other legatees; and also setting forth the inventory filed by himself and his co-executor, and suggesting the insufficiency of the assets to pay the debts and satisfy the legacies, whereby a proportionable abatement has become necessary; and stating that another bill had been filed against him in this court by Henry H. Ross and Susannah, his wife, for a legacy bequeathed by the same will to the said Susannah. To which bill he has put in an answer, and which is still pending, and submitting, that according to the course and practice of the court after suit brought by one legatee, the other legatees should be made parties thereto, or come in under the decree that may be made therein; but offering to account as executor and trustee as aforesaid in such manner as the court may direct.

The cause is submitted on bill and answer, and the form of an order is presented by the complainants, directing references on the principle suggested by the answer.

The only point made by the executor is, that all the legatees and *cestui que trusts* ought to be made parties to the suit, as well because the estate is inadequate to the full payment of the legacies, and the legacies must therefore abate, as because he is a trustee as well as an executor.

It seems to be the settled principle of the court that creditors are not to be permitted to prosecute separate suits for their respective demands, but that the claims of all are to be brought in under a decree upon one bill, and the same principle would seem to apply with equal force to legatees in the case, especially of the inadequacy of the assets to the full payment of all the legacies. The inconveniences attending the simultaneous prosecution of numerous suits against the same party for a participation in a common fund are alone decisive against the practice. The proceeding is open to the objection of a useless multiplicity of suits, and to all the difficulties consequent upon different decrees and different reports, which, if conducted by different solicitors, may be variant in their results and principle from each other; and the expense to the estate must always be onerous, and may be ruinous.

I am satisfied, therefore, that an order would, in ordinary cases, be proper, directing the proof to be taken of the legacies claimed by the complainants, and for an account of the estate by the executor and trustee; and that all other legatees be at liberty to come in under the decree, and be restrained from prosecuting separate suits for their legacies; and an order, with proper directions to the master for conducting the reference, would have been made in this case if no previous suit had been pending. But Ross and wife commenced their suit before the complainants filed this bill. That cause has not

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directing an account in one cause only; and in the mean time stay the proceeding in the others, leaving all the parties interested in the fund, to come in under the decree. From the reservation in the decretal *order in that

been brought to a hearing, and the complainants who prosecute it are not before me upon this hearing.

Do they possess any rights resulting from the pendency of their suit which can interfere with the exercise of the discretionary power of the court to make the order in this cause, otherwise usual in similar cases? I incline to think that the order may be made in the cause which is first ripe for a decree, whether that cause was first commenced or not: and that when the decree is made in the younger suit, then the proceedings in the elder suit must be stayed, and the complainants in that suit are to come in and prove their legacies under the decree in the second suit. In the case of *Jackson v. Leaf*, (1 Jacob & Walker, 229,) the Chancellor held that if one creditor filed a bill in this court, and afterwards another creditor files his bill, and the executor answers the second bill directly, and a decree is obtained, it is competent to the executor himself to restrain the first from proceeding; and he shows that the course has lately been, when a creditor is thus stopped, to pay him the costs that he has incurred prior to his having notice of the decree. And the Chancellor said that he took the rule to be universal. That was a case of creditors. But it certainly is not a greater exercise of power to restrain a legatee than it is to restrain a creditor from proceeding in his suit.

An opinion seems since to have prevailed that the executor must, in such cases, apply to the court for an injunction to restrain the other creditors or legatees from proceeding in their suits. But the more simple course of a motion in the cause wherein the decree is made has been introduced into the modern practice of the court and is certainly preferable to the more expensive proceeding by bill; and it is equally efficacious in its operation with an injunction upon suits and proceedings in the same court, and it may indeed be said, substantially between the same parties. If, then, an order is effectual for the purpose, that order may be made a part of the decree, and the legatees who are prosecuting other suits upon notice of the order which directs the proceedings in those suits to be stayed, will be in contempt if they afterwards proceed.

The principle recognized and acted upon by the court in the case to which I have referred had long been in existence, and had become familiar to the English Court of Chancery. In *Gilpin v. Lady Southampton*, (18 Ves. 469,) where a motion was made for an injunction to restrain a creditor from proceeding at law after the usual decree at the Rolls by consent, upon the bill of a creditor against the defendant as administrator of Lord Southampton, which involved the same principle applied to a much stronger case, Lord Chancellor Eldon said, that ever since he had known that court, suits had been allowed against executors; and, in truth, by executors in the name of a creditor

case, which has been recently settled and entered as of the 18th of April last, it is evident he did not intend to settle the question as to which suit should be proceeded in. This must always be a matter of discretion in the court, which,

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against themselves; and when once a decree was made, it was impossible to permit a creditor to go on at law. And the same reason for enjoining the suit at law, must surely be sufficient to induce the Chancellor to restrain the further prosecution of a suit in his own court.

This rule of equity was first noticed in the Court of Chancery of this state, by Chancellor Kent, in the case of *McKay v. Green and others*, (3 John. Ch. Rep. 56,) where the case of *Gilpin v. Lady Southampton* was cited; and the Chancellor expressed a disinclination to follow the rule it prescribed, as he said that he was not sufficiently informed or prepared to assume the entire and exclusive jurisdiction of suits against executors and administrators merely for the purpose of enforcing a rateable distribution of assets; but he soon had occasion, upon more full consideration, to change his first impression; and in the case of *Thompson v. Brown*, (4 John. Ch. R. 642,) after an able review of all the cases, he fully approves the principle of the English Court of Chancery, and adopts their rule. He winds up his review of the English cases with the conclusion, that the doctrine of the English Court of Chancery as finally settled is, that upon the usual decree to account in a suit by one or more creditors against an executor, either simply for themselves or specially on behalf of themselves and all other creditors, the decree is for the benefit of all the creditors, and in nature of a judgment for all: and that all are entitled, and are to have notice to come in and prove their debts before the master; and that from the date of that decree, an injunction will be granted upon a due disclosure of assets, on the motion of either party to stay all proceedings of any of the creditors at law.

Brown v. Ricketts, (3 John. Ch. Rep. 553,) was a bill against executors and trustees by one legatee, in behalf of himself and such other legatees of the testator as might choose to come in and contribute to the expense of the suit, An objection was taken at the hearing for want of parties, on the ground that the other *cestui que trusts* were neither plaintiffs nor defendants. But the Chancellor sustained the bill. He admitted that, ordinarily, all persons interested in the fund must be parties to the suit, but held that creditors and legatees form exceptions to the rule; and that one creditor or one legatee may sue on behalf of himself and the rest, and the others may come in under the decree. The case of creditors, he observes, is a familiar exception, and the exception as to legatees, (not being residuary legatees,) seems to be equally well known. The cases in the English Court of Chancery to which Chancellor Kent refers, fully support the rule. Lord Thurlow, in *Parsons v. Neville*, (3 Bro. C. R. 365,) where the bill was by some of the residuary devisees in behalf of themselves and the other devisees, ruled that all the devisees must be parties. But Lord Eldon, in *Cockburn v. Thompson*, while he recognizes

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while it protects the rights of the defendant, *will also see that no injustice is done to the complainants in any of the suits. It does not distinctly appear by the papers before me, what are the pleadings in the other suit; but, from the opinion of the late Chancellor, I infer that no replication was filed to the answer. If so, it is probable the answer would be conclusive against all persons who should come in under a decretal order in that suit. In this suit, three answers of the defendant have been found insufficient, and

the general principle of that decision, qualifies it by the exception of cases where it is not necessary or convenient that all should be before the court; and I deduce from that and other cases the principle, and in the case of residuary legacies, in common with all the cases where it is impracticable to make parties, or when the inconvenience and expense would greatly overbalance the utility of the proceeding, and all the rights and interest of the whole class of persons to be affected by the decree, may be protected and preserved by their subsequent accession to the suit on the reference before the master, this court will dispense with them as parties on the record, and give the opportunity of introducing them into the suit, by subsequent proceedings before the master.

It is not necessary, however, in this case, to pursue that inquiry; for supposing the exception of residuary legatees to remain in its full extent, this is not the case of residuary legatees. The will, it is true, does bequeath a residue of the estate to residuary legatees; but the complainants in this suit, as well as in that of Ross and wife against the same defendant, sue for particular legacies bequeathed to themselves, and in which no others are interested with them. And each of these legatees had the undisputed right to sue separately for their own legacy; and to their suits the principle clearly applies, that the decree in one suit is for the benefit of all who are similarly circumstanced, and in the nature of a judgment for all. Indeed, if the suggestion of the inadequacy of the estate to satisfy the legacies proves to be true, there can be no residue left for the residuary legatees; and if that suggestion should be groundless, I see no sufficient reason why the residuary legatees may not come before the master and protect their interest, and ultimately be embraced in the decree which is to settle the estate, and determine and adjust the rights of the parties, as beneficially as they could do if made parties upon the record, and brought into court by subpoena. If their interest should be found to involve difficulties not now foreseen, it will be time enough to apply the remedy when the mischief makes its appearance. It is sufficient for the purpose of the pending suits, that the residuary legatees are not necessary parties to them, and that all the special pecuniary legatees are to be satisfied before the residue, belonging to residuary legatees, can be ascertained, or it can be known whether there will be any residue or not.

a fourth, is put in, to which the plaintiff has filed a replication. The order of reference in the other cause also appears to be defective in many particulars. I shall therefore direct a reference to James King, a master, to ascertain and report which suit it will be most for the interest of the legatees and parties interested in the estate, to have the account taken in; that notice be given to the complainants in each suit, that they may appear and be heard before the master on the reference; that either of the parties in this suit be at liberty to take out a summons and proceed on the reference before the master; and that the proceedings in all the suits be stayed until the further order of the court. All other directions are reserved until the coming in of the master's report.

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LEAVITT v. CRUGER AND WIFE

Where a bill is filed against husband and wife, the husband is bound to enter a joint appearance, and put in a joint answer for both.

But if the wife refuses to join in an answer or a plea, the husband will be permitted to put in either separately.

The service of a subpoena upon the wife, is only necessary where the proceeding is against her in respect to her separate estate.

ON a bill to foreclose a mortgage executed by husband and wife, the subpoena was served on the husband only, the wife residing in France. The husband entered an appearance for himself, and filed a separate answer. A solicitor appeared for the wife separately, and the plaintiff served him with a copy of the bill, but no answer for her had been put in. Feb. 17th.

Tillinghast, for the complainant, presented a petition praying that the answer of the husband might be taken from the file, and that he enter a joint appearance for him-

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self and wife, and put in a joint answer, or that the bill be taken as confessed.

J. Rhoades, contra, insisted that the complainant had waived a joint appearance and answer by serving a bill on the wife's solicitor, on her separate appearance; and that it did not appear that he had entered the usual rule for the husband and wife to appear

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*THE CHANCELLOR:—The husband is bound to enter a joint appearance, and put in a joint answer for himself and wife, unless he shows a sufficient excuse. But if she refuses to join with him in an answer, or to swear to a plea, he will be permitted to put either in separately. (*Chambers v. Bull*, 1 Anst. 269; *Pain v. —*, 1 Ch. Cas. 296.) So far as relates to the appearance of the defendants jointly, it is probable that the complainant might have compelled it, either under the 114th or 115th rule. After the appearance had been entered, it would be incumbent on the husband to see that she answered jointly with him, or he should have obtained an order to answer separately, on showing that he could not prevail upon her to swear to a joint answer. If she had refused to answer, the bill would have been taken *pro confesso* against her, unless she applied and obtained an order to answer separately. Service of the subpoena on the wife is only necessary where the proceeding is against her in respect to her separate estate, in which case the husband is only a nominal party; and not where the estate is in the husband in right of the wife. (2 John. Ch. Rep. 139; 9 Ves. 486.) It does not appear from the papers before me in this case whether the mortgaged premises belonged to the husband in his own right, or in right of his wife.

The filing of the separate answer of the husband, without an order authorizing it, was irregular; and there does not appear to have been any replication filed, or other act of the complainant waiving the irregularity. It must there-

fore be taken off the files, and the husband must enter a joint appearance for himself and wife within ten days, or the bill be taken as confessed. After the appearance is entered, he must have six months to take out a commission and obtain the wife's oath to the answer, unless the plaintiff stipulates in writing to receive the joint answer sworn to by the husband only. But on filing such stipulation, the defendants must put in such answer within thirty days after notice thereof, or the bill may be taken as confessed against them.

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As the husband was misled by the service of the bill on the separate solicitor of the wife, neither party is entitled to any costs on this application.

*BAY AND MONELL ADMINISTRATORS, &c., APPELLANTS,
v. VAN RENSSELAER AND OTHERS, RESPONDENTS.

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• The thirty days within which an appeal from the decree or sentence of a surrogate to the Court of Chancery must be entered, is to be computed from the time the same is pronounced, and not from the service of a copy thereof

THIS was a motion to quash an appeal from a decree of Feb. 18th. the surrogate of Columbia. The final sentence was pronounced and entered in the records of the surrogate on the 9th of December, 1828. On the 18th of the same month a copy thereof was served on the appellants by the proctor for the respondents, and payment was demanded of the amount decreed to be paid. The appeal was not entered until the 17th of January, 1829.

C. Bushnell, for motion.

A. L. Jordan, contra.

THE CHANCELLOR:—The only question in this cause is, whether the appeal should be entered within thirty days

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after the making and entry of the final sentence of the surrogate, or within the same time after service of a copy thereof. By the civil law, the appeal must be entered within ten days after the date of the sentence or order appealed from. (Domat's Supplement to the Public Law, book 4, tit. 8, art. 2, note.) The time was afterwards extended by the statute 24 Hen., ch. 12. The 7th section of that Act provides that the appeal to the judge *adquem* shall be entered within fifteen days next ensuing the sentence. The act of the 20th of February, 1787, (1 Greenleaf's Laws, 366,) saves to the party aggrieved by the order or sentence of a surrogate, his right of appeal to the Court of Probates, so as such appeal be taken within fifteen days next after the order or sentence appealed from be made. In the revisions of 1801 and 1813, the provisions limiting the time for appealing are substantially the same as in the act of 1787. The act of March, 1823, *which abolished the Court of Probates and substituted an appeal to the Chancellor, extends the time for appealing from fifteen to thirty days. In other respects the provision is substantially in the same language as in the former statutes. It was not intended by any of these statutes to change the rule of the civil law, except so far as they extended the time for appealing from ten days to fifteen, and finally to thirty days from the date of the sentence or order appealed from. Although the language of the statutes have varied, there is nothing from which it can be supposed there was any intention to alter the date from which the time for appealing was to be computed. The appeal must be entered within thirty days after the sentence is made and entered by the surrogate. This appeal was entered nine days after the time allowed for appealing had expired, and being irregular it must be dismissed.

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N. RODGERS AND OTHERS v. H. RODGERS AND OTHERS.

An injunction bill will not be amended, unless the proposed amendments are distinctly stated to the court, and verified by the oath of the complainant; nor unless a sufficient excuse is rendered for not incorporating them in the original bill.

The application to amend must be made as soon as the necessity of the amendment is discovered.

THIS was an application to amend an injunction bill without prejudice to the injunction. The grounds on which the application was denied, appear in the opinion of the Chancellor.

Feb. 18th.

S. Rodgers, for the complainants.

H. Bleecker, for the defendants.

THE CHANCELLOR:—The complainants apply to amend an injunction bill after answer, on the ground that exceptions to the answer have been allowed. No affidavit of the truth *of the charges contained in the proposed amendments, or excuse for not inserting them in the original bill, is furnished. The 15th rule of this court, authorizing the complainant to amend his bill of course, and without costs, on exceptions allowed to the answer, does not apply to an injunction bill, or to any other which has been sworn to by the party. Such was the construction given to the 11th rule, in *Parker & Bliss v. Grant*, (1 John. Ch. Rep. 434.) And in *Beekman v. Waters*, (3 John. Ch. Rep. 410,) where the defendant had submitted to answer exceptions, although an amendment was allowed on the particular facts sworn to in the petition, Chancellor Kent declared, that if the amendments required a new or further answer, they ought to be allowed only upon payment of costs.

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A loose kind of practice in relation to amending injunction bills has crept into this court, which I am satisfied

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has been productive of great delay and injustice, and for which there appears to be no remedy, except by adhering more closely to the ancient practice of requiring the complainant to state the whole of his equity in his original bill. When he applies to amend without prejudice to the injunction, he must state the proposed amendments distinctly, so that the court can see that they are merely in addition to the original bill, and not inconsistent therewith. He must also swear to the truth of the several matters proposed to be inserted as amendments, and render a valid excuse for not incorporating them in the original bill; and the application to amend must be made as soon as the necessity of such amendment is discovered. (*Sharp v. Ashton*, 3 Ves. & Beam. 144; and *Mair v. Thellusson*, in note to page 145; *Norris v. Kennedy*, 11 Ves. 565.)

The application being defective in nearly all of these respects must be refused with costs.

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*N. RODGERS AND OTHERS v. H. RODGERS AND OTHERS.

Where the equity of an injunction bill is not charged to be in the knowledge of the defendant, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone.

Where a bill is filed to restrain proceedings on a judgment recovered at law, the court will not require the complainant to bring the amount of the judgment into court, unless it is shown there is danger of the complainant's insolvency.

March 3d.

THIS bill was filed against the personal representatives of F. Rodgers, deceased, to restrain proceedings at law on notes given to the testator. The equity of the bill on which the injunction was granted was not charged to be in the knowledge of the defendants; and they put in an answer denying all knowledge or belief as to the principal

facts on which it rested. By a previous order of the court, the injunction was modified so far as to permit the executors to proceed to trial and judgment at law, without prejudice to the complainants' rights.

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H. Bleeker, for the defendants, now moved to dissolve the injunction, or to modify it, by requiring the complainants to bring the amount recovered into court; or that they give security to pay the amount which might be eventually found due.

S. Rogers, contra.

THE CHANCELLOR:—In such a case as this, the injunction cannot be dissolved on the bill and answer alone; but the court in its discretion may require, as a condition of the granting or continuance of the injunction, that the complainants bring the amount apparently due into court, to abide the decision of the cause, unless the equity of the bill is verified by other testimony than his oath alone. (*Dalby v. Catchlowe*, 4 Price, 147; *Taggart v. Hewlett*, 1 Meriv. 499.) If there was any danger of insolvency in this case, I should require *the amount of the judgments to be brought into court, or security to be given. But the allegation of one of the defendants who appears to be a nominal party merely, that he is afraid of insolvency, or that the complainants will put their property out of their hands is not sufficient. Under the circumstances of this case, I think it would be putting the complainants to unnecessary expense and trouble to raise and deposit this large amount of money. The motion must, therefore, be refused, and the costs must abide the event of the suit.

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CANDLER v. PETTIT, IMPEADED WITH OTHERS.

Where several exceptions are taken to an answer, allowed by the master, a single exception to the report insisting upon the sufficiency of the answer generally, cannot be sustained, if any of the exceptions to the answer are well taken.

THIS cause was heard on exceptions to the master's report allowing exceptions to an answer for insufficiency. The facts on which the case was decided, appear in the opinion of the court.

R. Sedgwick and D. D. Field, for complainant.

G. Brinckerhoff, for defendant.

THE CHANCELLOR:—If various exceptions are taken to an answer, and allowed by the master, a single exception to the report insisting upon the sufficiency of the answer generally, cannot be sustained, if any of the exceptions to the answer are well taken. (*Hodges v. Salomons*, 1 Cox. Cas. 249.) If the defendant wishes to have the master's report reviewed as to particular exceptions alleged to have been improperly allowed, he should except to the report in those particulars, and not compel the court to go over the whole answer.

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*The exception to the master's report in this case insists upon the sufficiency of the answer generally. Without going through the various exceptions to the answer, I am satisfied that many, if not all of them, are well taken. The question whether the debts and choses in action and stock of the defendant can be reached by the process of this court, if it has not been fraudulently placed out of the reach of an execution at law, does not properly arise on this exception to the master's report. My opinion on that question was distinctly expressed on the motion for an injunction.

tion in this cause. But whether such relief can be granted or not, this answer is insufficient in many particulars. It is true the defendant denies all fraud, but the complainant has a right to a discovery of the manner in which he has disposed of his property, to enable the court to see whether it is fraudulent, as well as to enable the complainant to sustain the allegations in his bill by testimony. The question as to what relief the court has power to give, will again arise on the final hearing, when all the facts are before the court; and if the defendant is not then satisfied with the decision, he will have an opportunity to bring the whole subject before the court of *dernier* resort. But I have no reason to believe that court will ever abandon the broad ground taken by it in *Hadden v. Spader*, (20 John. Rep. 554,) especially since the legislature have expressly sanctioned the principles recognized by Chief Justice Spencer and Judge Woodworth, in that case, by incorporating them into the Revised Statutes. R. S. part 3, ch. 1, tit. 2, art. 2, sec. 38, 39, and revisor's note to sec. 35, as originally reported.)

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The exception to the master's report must be overruled, and the defendant Pettit must pay the costs of the original exceptions and the subsequent proceedings, and put in a further and perfect answer to the complainant's bill within twenty days.

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Where a party comes to Chancery to avoid a usurious contract, he must consent to pay the sum actually loaned, with interest, or the court will not grant him any relief.[1]

[1] This rule is abrogated in New York, by statute. It is, by this enactment, no longer necessary that the borrower seeking relief or discovery, should pay or offer to pay back any interest or principal on the sum loaned;

1829. And where the proofs in a cause are regularly closed, the court will not open them to enable the defendant to re-examine a witness in order to establish the usury, unless he agrees to pay the sum actually lent.
 Fulton Bank v. Beach. So the court will not allow an answer to be amended for the purpose of setting up a defence of usury, unless the defendant consents to pay the amount equitably due.

March 3d. THIS was a petition on the part of the defendants for leave to open the proof and re-examine one of the complainants' witnesses, upon the ground that new facts had been discovered on his cross-examination in a court of law, since the testimony in the suit was closed. The defence was usury.

J. Hoyt, for the complainants, insisted that the new facts which were now attempted to be proved, would not support the particular defence set up in the answer; and that the court ought not to aid a defence of usury.

D. Buel, jun., for the petitioners, in answer to a suggestion from the court, stated that he was not authorized to waive the defence of usury as to the sum actually loaned

THE CHANCELLOR:—Without examining the question whether the new facts are admissible as evidence, under the present state of the pleadings, I am satisfied the other objection, taken by the complainants' counsel, is fatal. If a party seeks equity in this court, he must do equity. If he comes here to obtain a discovery, or to get rid of a usurious contract, he must consent to pay the money actually lent, with legal interest. If the defendant sets up a

nor can a court of equity compel him to do so, as a condition of granting relief. See 2 R. S. (4th ed.) 182, secs. 8, 13; *Livingston v. Harris*, 3 Paige, 528; S. C., 11 Wen. 329. But a subsequent mortgagee is not a borrower within the meaning of the usury laws, so as to authorize him to file a bill to set aside a previous security, given by the mortgagor, on the ground that it is usurious, without paying or offering to pay the sum actually due. *Rexford v. Birdsell*, 8 Barb. Ch. 640; *Rexford v. Widger*, 2 Comst. 131; see also *Hartson v. Devanport*, 2 Barb. Ch. 77.

defence of usury, either in this court or at law, he is at liberty to sustain it if he can by proof in the usual way. But if he neglects, or is unable to do that, when he applies to this court to aid him in such defence, he must consent to do equity before this court will afford him any relief. The proofs in this cause were *regularly closed more than six months since. The defence of usury has been set up at law, and a jury have decided against it. The defendants now ask of this court the favor to re-examine one of the witnesses, to enable them to establish the usury; but they decline paying the sum actually loaned. The application must therefore be refused. This is not a new principle here. In *Hall v. Wood*, in September, 1826, an order taking the bill *pro confesso* was vacated on an affidavit of merits; but, as the proceedings on the part of Hall had been regular, the late Chancellor annexed a condition to the order opening the default, that the defendant should not interpose the statute of limitations as a defence; which he considered would not be conscientious under the particular circumstances of that case.

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The defendants subsequently applied to amend their answer for the purpose of setting up a general defence of usury, to enable them to establish a different kind of usury from that set up in their former answer. The motion was argued by

S. A. Foot, for the defendants:—He contended that the application now was to enlarge the answer. Usury had been set up therein generally, without a knowledge of the particular facts. These facts have since been discovered. The draft answer, which was prepared by the defendants' counsel and miscarried in the post-office, contained substantially what was now asked to incorporate in the answer by way of amendment. Mistakes in pleading should always be corrected where justice will be administered by so doing. Usury is a meritorious defence; and the defendants being

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 Fulton Bank v. defence of usury goes to the right, it is always favored.
 Beach. The counsel cited *Bowen v. Cross*, (4 John. Ch. R. 375.)

[*481] *J. Hoyt*, for the complainants:—Application to amend pleadings are not granted except upon terms; (*Beekman v. Waters*, 3 John. Ch. R. 410; *Shepherd v. Merrill*, 3 John. Ch. R. 423; *Thorn v. Germand*, 4 John. Ch. R. 363; **Bowen v. Cross*, 4 John. Ch. R. 375.) The party asking to amend his answer, must satisfy the court that at the time of putting in the answer, he was ignorant of the facts which he seeks to insert in it by way of amendment; (*Liggon v. Smith*, 4 Hen. & Munf. 407; *Const v. Barr*, 2 Meriv. 57.) An amendment will not be granted where there has been a mere mistake of law; (*Pearce v. Grove*, 3 Atk. 522; S. C., *Ambler*, 65.) And where a party has not set forth his defence, in consequence of an inability to do it with precision he cannot amend; (*Tennant v. Wilsmore*, 2 Anstr. 363.) An amendment must be moved for, the first opportunity, and must be sworn to. It must also be served upon the opposite party; (*Rodgers v. Rodgers*, ante p. 424.) The Court of Chancery will not relieve against a usurious contract, unless the party seeking relief does equity by paying the sum actually advanced; (*Rodgers v. Rathbun*, 1 John. Ch. R. 367; *Tupper v. Powell*, 1 John. Ch. R. 439; *Fanning v. Dunham*, 5 John. Ch. R. 122.) The court will not, therefore, upon this principle, grant the amendment moved for by the defendants in this case, unless they consent to pay the sum equitably due. The effect of the amendment would be to enforce a penalty or forfeiture; a proceeding which equity never aids; (*Livingston v. Tompkins*, 4 John. Ch. R. 431; *Mason v. Gardiner*, 4 Bro. C. C. 436.) It is a settled rule, that if a defendant mispleads the statute of usury, he shall be bound by his plea; (*Parker v. Rochester*, 4 John. Ch. R. 332; *Hamilton v. Boiden*, 1 Mass. Rep. 50.) In *Goff v. Popplewell*, (2 Term. Rep. 707,) an amendment

was refused, although without the amendment the right of action would be gone.

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THE CHANCELLOR :—When this case was before me, on the petition to re-examine Mark Spencer as a witness, I did not examine the question whether the new facts proposed to be proved by him were admissible under the present state of the pleadings. That question was distinctly raised and argued on that occasion by the complainants' counsel; but as I was *clearly with him on the other points, I did not consider it necessary to look farther. The defendants being probably satisfied that this objection was well taken, notwithstanding their appeal to the Court of Errors from the decision of this court refusing such re-examination, now ask to amend their answer for the purpose of making the new evidence material, if they should succeed in reversing that decision. The application at this time appears to me premature and unnecessary. If the former decision of this court is reversed, it necessarily follows that the new testimony ought to have been received, and was proper under the pleadings as they now stand. If that decision is affirmed, the witnesses cannot be re-examined, and the amendment would be useless. As the case now stands, it is *res adjudicata* in this court, that the rule to close the proofs is not to be opened; and while an appeal from that decision is pending, this court ought not to do that indirectly, by an amendment, which it could not do directly. The defendants should have dismissed their appeal and made an application here to amend and to re-examine the witness to the new matter, or should have waited until that appeal was determined. But, as both parties have requested that the question may be decided now, I shall dispose of it without waiting for the decision of the Court of Errors.

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The former application was denied on the ground that the relief prayed for in the petition was not a matter of strict right, as the proceedings on the part of the complainants to close the proofs had been perfectly regular. The

1829. defendants, therefore, were asking a favor, which the court, in the exercise of a sound discretion, was not bound to grant, unless they would also do equity to the other party. The reasons given for refusing that application apply equally to this, but with greater force.

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The power of the court to allow amendments, in furtherance of justice, at any time before a final decree, is unquestionable. They are always in the discretion of the court; but the exercise of that discretion must be governed by those general principles of equity by which the proceedings in this court are regulated. One of those principles is not to lend the aid of the court to enable a party to enforce a forfeiture, or any thing in the nature of a penalty or forfeiture. (*Livingston v. Tompkins*, 4 John. Ch. Rep. 415.) If a party sues in a court of law upon a usurious contract, the defendant has a right to set up the legal defence, and insist upon the forfeiture, if he can establish the facts. But if he cannot avail himself of that defence without the aid of a court of equity, when he applies for equitable relief, he must consent to waive the forfeiture, and pay or agree to pay the amount actually due. (*Rogers v. Rathbone*, 1 John. Ch. Rep. 367; *Tupper v. Powel*, id. 439; *Fanning v. Dunham*, 5 John. Ch. Rep. 122. And the same rule prevails when he applies for equitable relief to a court of law. (*Fitzroy v. Gwillim*, 1 Term Rep. 158.) It makes no difference that a suit upon the usurious contract is brought in this court. If such a suit is brought here the defendant may set up the usury in his answer, and if he can establish it by proofs in the ordinary way, it will be a complete bar to the suit. But if he asks for the interposition of the extraordinary or equitable powers of this court to aid him in such defence, he must consent to do equity before he can obtain that aid. Thus in *Mason v. Gardiner*, (4 Bro. Ch. Cases, 436,) where a suit was brought in Chancery, upon securities which were tainted with usury, and the defendant filed a cross bill to discover the usury, it was held bad on demurrer, because he did not offer to pay the sum

which was equitably due. So, if the defendant neglects to set up the defence of usury in his answer, whether by mistake or negligence is immaterial, when he applies to the court from the favor to amend his answer, he should offer to pay the amount actually due with legal interest. But here the defendants ask the court to permit them to amend with the avowed object of getting rid of the payment of moneys actually loaned, as well as of the usurious excess included in the securities. The granting of such an application would not be the exercise of a sound legal discretion, as it would be a violation of the settled principles of the court. An amendment to an answer which has been sworn to by the defendant is always granted with extreme caution. (*Brown v. Cross*, 4 John. Ch. Rep. 375.) And I am not aware of any case in which such an amendment has been allowed after the witnesses had been examined, and the proofs in the cause were closed.

But there are some extraordinary features in this application which show the danger of permitting a party to set up a new defence after the testimony in the cause has been taken. The defendants have put in a joint answer, in which some of them swear positively to, and the others as to their belief in a state of facts which is wholly inconsistent with the facts they now seek to avail themselves of under the amendment asked. They do not pretend there was any mistake in the allegations in their former answer; but still insist those allegations are true, and that the defence which they now seek to establish is not true in point of fact. Yet as the complainant's witness, who swears in opposition to their answer, has stated those matters, they wish to amend their answer so as to avail themselves of them, if the court should be satisfied their present answer is incorrect in point of fact. To avoid the difficulty of swearing to a defence which they do not believe to be true, they propose, in their supplemental answer, to state generally, that the complainants' demands were founded upon a usurious consideration, without specifying the particulars.

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I think the senior counsel who examined and amended the original answer, was right in leaving out this allegation. This general manner of setting up usury is certainly not sufficient in a court of law; and I know of no rule of equity which can authorize such a loose method of stating a defence here. (*Smith v. Brush*, 8 John. 84; *Lawrence v. Knies*, 10 John. Rep. 140.)

The motion must be denied with costs

FRITH v. LAWRENCE, ADMINISTRATOR OF MACTIER.

Where an offer to sell is made to a distant correspondent by letter, and he declines the offer, he cannot afterwards assent to it so as to make it a valid purchase without a subsequent assent of the other party also.

If he accepts the offer conditionally, the other party is not bound unless he consents to the condition.

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*An offer to purchase was made by letter, and previous to the receipt of the letter by the other party, the party making the offer died insolvent. The party receiving the letter consented to sell on the terms proposed, and sent an answer to that effect, but without any knowledge on his part of the death of the purchaser. Held, that he was not bound by such acceptance of the offer, and that the title to the property was not changed.

To make a valid contract, it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but that fact must be communicated to each other.

March 3d.

H. MACTIER was a commission merchant in New York, and died about the 10th of April, 1823. The complainant is a resident at Jacmel, in the republic of Hayti. He filed his bill in this cause against the administrators of Mactier, claiming a certain shipment of brandy, a part of which had been sold by Mactier in his life time, and the residue by the defendants. He also claimed a specific lien upon the proceeds of the sales of the brandy, and the proceeds of a certain letter of credit given by H. Wylie, or certain bills of exchange drawn in pursuance thereof, to pay a balance

due to him from the estate of Mactier, which was insolvent. The answer of the defendants being put in issue by a replication, an order was entered by consent, referring it to a master to examine the witnesses, &c., and report whether in his opinion the complainant was the owner of any, and what part of the shipment of brandy at the time of the sale of any such part, (whether the sale was made by the intestate, or by his administrators;) and if so, whether as such owner he had a lien by virtue of such ownership, on the said brandy, or the proceeds thereof in the hands of the defendants; and also whether he was entitled as owner, or as having any special claim or lien on the proceeds of the letter of credit, or of the bills of exchange. And if he should be of opinion that the complainant was entitled as a special creditor, or had a specific lien, the master was further directed to state an account, and report the amount due to him as such special creditor, or as having liens on any of the said subject matters. In such case he was also directed to report the amount due to the complainant as a common creditor, if any thing was due him in that character, beyond the amount due him as a special creditor. And all further directions were reserved.

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*A mass of evidence, principally documentary, was taken before the master, and he finally reported that in his opinion the complainant was not the owner of any part of the shipment of brandy at the time it was sold, and had no lien on any part thereof, or on the proceeds in the hands of the administrators. He also reported that the complainant had no special claim or lien on the proceeds of the letter of credit of H. Wylie, or of the bills of exchange, drawn in pursuance thereof. The complainant excepted to the master's report, and the cause was heard on those exceptions before the late Chancellor, but was not decided by him. One of the administrators having died, the cause was continued against the survivor, and again brought to a hearing on the exceptions to the report.

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J. Stevens & G. Griffin, for complainant:—No sale was made of the brandy in question by Frith to Mactier. The contract never passed from an inchoate to a consummated state. Any lurking intention to sell the brandy can be of no moment. The testimony shows offers and negotiations only, not conclusion of minds. The acceptance of the first proposition of Frith, was deferred by Mactier, and made to depend upon a condition. The second offer contained in a letter to Mactier did not reach this country until after his death, and therefore could not be binding upon Frith. (*Anson v. Meyer*, 6 East, 614; Pow. on Con. 442. A party can always revoke an offer until he has received notice of its acceptance. (*McCulloch v. Eagle Ins. Co.*, 1 Hick. 278. *Adams v. Lindsell*, 1 Barnwell & Ald. 681.) Mactier should in a reasonable time have elected to accept the proposition of Frith. (Rob. on Frauds, 142; *Eliason v. Henshaw*, 4 Wheat. 225; *Cooke v. Oxley*, 3 D. & E. 653.) If a vendee becomes insolvent before he takes possession of the goods sold, the vendor will not be bound by the contract of sale. (*Gibson v. Bray*, 8 Taunt. 76; *Wallace v. Breeds*, 13 East, 522; *Ward v. Felton*, 1 East, 508; *Haggerty v. Palmer*, 6 John. Ch. Rep. 437.) The lien of the vendor for the purchase-money is not lost, nor his right of stoppage *in transitu* gone, until the goods come into the actual possession of the *vendee. [*437] (*Litt v. Cowley*, 7 Taunt. 169; Whit. Law of Liens, 214; *Hanson v. Meyer*, 6 East, 614; Anthon. N. P. 165; Abbot on Ship. 364; Long on Sales, 185; *Northey & Lewis v. Field*, 2 Esp. Rep. 613, 614; *Palmer v. Hand*, 13 John. Rep. 434; *Vernon v. Hankey*, 2 T. R. 113; *Godfrey v. Furzo*, 3 P. Wms. 185; 5 T. R. 215, 230, 233-4; French Com. Code. Art. 576, p. 301.) The defendants in this case had no right, as administrators, to divest the complainant of his right of stoppage *in transitu*, their intestate having died insolvent before the arrival of the goods. Goods in the custom house are in the custody of the government for the benefit of the consignor or unpaid vendor, and the right

of stoppage *in transitu* continues. Courts lean in favor of liens. (*Green v. Farmer*, 4 Burr. 2221, per Ld. Mansfield; *Garson v. Green*, 1 John Ch. R. 308.) Even payment of part of the purchase-money, or a delivery of part of the goods will not take away the right of stoppage *in transitu* as to the goods not delivered. (*Hodgson v. Loy*, 7 T. R. 436.) In this case the defendants had not given the bond for the duties to entitle them to the possession of the brandy. (*Fiese v. Wray*, 3 East, 93; *Mason v. Lickbarrow*, 1 H. Bl. 357; *Howat v. Davis & Chalmers*, 5 Munf. Vir. R. 84; *Parks v. Hall*, 2 Pick. R. 212.) A partner has the same right of stoppage *in transitu* as a sole owner. (*Hughes v. Kearney*, 1 Schoale & Lefroy, 135; *Patten v. Thompson*, 5 Maule & Selw. 367.) If Mactier had a joint interest with the complainant in the brandy, the complainant, as the surviving partner, had the exclusive right to possession. The defendants are liable for the bills of exchange drawn by H. Wylie, in favor of Mactier.

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D. S. Jones and *S. Boyd* for the defendants:—The complainant was never liable to the French house for the brandy. The brandy was not of the quality ordered, and Mactier assumed the transaction, such as it was. Frith might therefore have disclaimed it. He, by letter, desired Mactier to take the whole speculation to himself; and Mactier, in effect, assented. Frith's intention to accept Mactier's offers was clearly shown by his acts. When Mactier insured the *commissions on the 1st of March, he had not heard whether Frith had accepted his proposition; and he therefore at that time treated the brandy as joint property. The sale of the brandy to Mactier was complete. Mactier, if he had lived, would have been legally bound by his proposition after the receipt of Frith's letter of the 7th March. As to the bills of exchange, they were in fact owned by Mactier, and Frith was not responsible to him for their payment.

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THE CHANCELLOR:—The counsel for the complainant insist that he is entitled to relief in this suit as a common creditor, if he has no specific lien on the funds in the hands of the defendant. That question does not properly arise at this time. It was not made a ground of exception to the master's report; neither was he authorized to report the amount due to the complainant as a common creditor under the order of reference. He was only to report the balance due to him as a common creditor, if it was ascertained he had a specific lien as to part.

On a careful examination of the testimony and the correspondence produced before the master, I agree with him that the complainant had no specific lien upon the proceeds of the letter of credit of H. Wylie. That appears to have been a transaction between the complainant and U. Bergeron & Co. on the one hand, and between them and Mactier on the other. The protested bills had been remitted by U. Bergeron & Co. to Mactier on account. By an agreement between Frith and the drawers, he had become responsible to see them paid. But they did not belong to Mactier, and he had no claim upon Frith, in consequence of the agreement entered into before the civil tribunal at Jacmel. The complainant by that agreement was bound to see the protested bill, with all costs and charges thereon, discharged; and as U. Bergeron & Co. wanted the funds in the hands of Mactier to meet his advances, the complainant procured the letter of credit to enable Mactier to realise the amount; but the latter had not discharged his claim against U. Bergeron & Co. or agreed to look to Frith for payment. The administrators, therefore, had a perfect right to use the letter of credit to satisfy the amount due from that firm, and were not bound to *offset their claim against the debt due from the estate to Frith.

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As to the overdrawing, it can be of no importance in this case, except so far as it may affect the question of costs. I think under the circumstances the legal claim to

that small balance must belong either to H. Wylie, U. Bergeron & Co., or the house in England on which the drafts were made. If the administrators were authorized to draw to that amount, the surplus was properly placed to the credit of U. Bergeron & Co., on whose account they received the authorization. If they drew beyond the authority contained in the letter of credit, Frith was not responsible to H. Wylie for the surplus. So far as respects the complainant, this overdrawing cannot be distinguished from the original bill transaction; and if Frith is liable for the whole amount to H. Wylie, he must look to U. Bergeron & Co. for his indemnity, as the administrators were only their agents in procuring payment of the protested bills, and have paid over the surplus to the principals.

The material and important question in this cause relates to the shipment of brandy, which I will now consider. On looking into the testimony on this subject, and the correspondence between Frith and Mactier, I am satisfied the complainant never was the sole owner. But if he did not make a valid sale of his interest in that adventure previous to the death of Mactier, he has a specific lien upon the proceeds of the fifty pipes which were afterwards sold by the administrators, and the proceeds of the notes received on the sale of the first 150 pipes, which had not been collected or negotiated previous to Mactier's death. I have no doubt the original transaction was substantially as stated in the answer of the administrators. The parties undertook an adventure in which they were to be equal sharers in profit and loss. A cargo of brandy was to be purchased in France on the credit of Frith, and consigned to Mactier at New York. On its arrival there, he was to sell it and remit the invoice cost in provisions consigned to Frith at Jacmel; from the sale of which the latter was to raise funds to furnish a shipment of coffee to his correspondent in France, to pay the original cost of the *brandy. Under this agreement, it would be immaterial whether Mactier charged a selling commission on the brandy or not. If he charged a

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commission, it would have been countervailed by a similar charge on the sale of the provisions by Frith in the West Indies; but neither could be entitled to a *del credere* commission, as the sales would be at the risk of both. In pursuance of this agreement, on the 5th of September, 1822, while the complainant was on a visit to New York, he gave an order on Firebrace, Davidson & Co., of Havre, for the shipment of 200 pipes of brandy, to be consigned to Mactier; but on his return to Hayti, he came to the conclusion to give up the adventure to Mactier, if the latter would consent to take it off his hands. Accordingly, on the 24th of December, he wrote to Mactier proposing that he should take the adventure solely to his own account, holding the value to cover the transaction to the complainant's account in New York. If this proposition had been directly and explicitly accepted by Mactier, there could be no doubt as to the proceeds of the 150 pipes sold before his death. But it might be necessary to examine the question so much discussed on the argument, as to the right of Frith to stop *in transitu* the fifty pipes which remained in the public store, and which had not come to Mactier's hands, and the liquidated duties on which had not been secured at the time of his death. Having arrived at the conclusion that Mactier did not, in his answer of the 17th of January, 1823, intend to accept of that offer, and that it was not afterwards binding on Frith, I do not consider it necessary to express any opinion on the question as to his specific lien on the proceeds of the fifty pipes only.

In Mactier's answer to the proposition of the 24th of December, he says the original adventure had from the first been a favorite speculation, and still promised a favorable result, and he was desirous it should go on in the way first proposed; but as Frith had expressed a wish that he should take the same on his own account, he should delay coming to any conclusion till he again heard from the complainant. If he had stopped there, the answer could only have admitted of one construction; but he adds: "The

prospect of a war between *France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti to be invested in coffee to be sent to France in French vessels, in which case I will at once decide to take the adventure to my own account."

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The defendants' counsel insist that this was a conditional acceptance of the offer of Frith; and as he did not dissent from it, both parties were bound by it as soon as it was ascertained there was such a prospect of war between France and Spain, as to render it unsafe to go on with the original adventure. (Whatever might have been the intention of Mactier, it was not such an acceptance of the offer of the 24th of December as to make that offer binding on Frith. And Mactier having declined to accept the adventure as proposed, he could not by any subsequent assent to the original offer made a valid contract for the purchase of the interest of Frith in the brandy. It is evident this conditional acceptance of the offer was never acted on, or assented to by Frith. For as late as the 28th of March, instead of assenting to a conditional sale, he again renews the original offer of the 24th of December, which was for an absolute sale.

Mactier did not consider himself the absolute or probable owner of the brandy on the first of March, or he would not have insured the commissions he expected to receive on the sale. On the 13th of March, when he considered war between France and Spain as inevitable, he says nothing more on the subject of taking the speculation to himself, but speaks of the brandy as a matter in which they were jointly concerned. He says the offices refuse to insure on French vessels, and he fears the delay in the shipment of the brandy will operate to the disadvantage of himself and Frith. It is true, the vessel arrived safe on the evening of that day, and soon after that he began to talk with his clerk, and consult with his friends as to the propriety

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or expediency of taking the brandy to himself. But he did not make up his mind until twelve days after the arrival of the vessel; and after he had ascertained the value of the brandy by an actual sale of three-fourths of the shipment. Under these circumstances, can it be supposed if any disaster had happened to the vessel *which was not covered or fully guarded against by the policy effected in France, or the brandy had come to a bad market, he would have considered himself bound by the indefinite and vague expressions contained in his letter of the 17th of January.

On the 7th of March Frith acknowledged the letter of the 17th of January, but said nothing about the brandy. This communication was received on the 7th of April, two or three days before Mactier's death. Another letter was written by Frith on the 28th of March, which was not received until long afterwards. In this he repeated the original offer contained in the letter of the 24th of December. As this letter never came to the knowledge of Mactier, and could not have reached this country until some time after his death, the master very correctly decided that Frith was not bound by the offer contained therein. But as Frith there states that he intended to have made the same offer in the letter of the 7th of March, which Mactier did receive, the Master considers it evidence of a mental assent to the conditional acceptance of the offer of the 24th of December; and that the letter of the 7th of March is to be taken as if it contained a renewal of the proposition of the 24th of December. If the mental assent of Frith was alone sufficient to close the bargain, so as to make it binding on both parties, without any expression of such assent, I should not consider the expression in the letter of the 28th of March as evidence of that mental assent, but the contrary; because the offer in those letters is not the same contract as that contained in the letter of the 17th of January, but materially different. The first is an absolute

sale, to take effect immediately ; the other is conditional, to take place on a contingency, leaving Frith responsible for one-half of all risks in the mean time.

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The letter of the 28th of March is undoubtedly evidence that on the 7th of that month Frith wished to renew his offer to sell. To make a valid contract it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must communicate that fact to each other, so that both parties may know that their minds do meet. Why did the master decide that the letters of the 25th and 28th of March did not of themselves make a valid contract? Both minds met on the same point on the 28th of March, when the letter of Frith was written, and the invoice price of the brandy was credited to him by Mactier. But as the latter never heard of the letter, and the former never heard of the entry until after the death of Mactier, there was no contract made which was binding on either. If the master had applied this same principle to the mental assent of Frith at the time he wrote the letter of the 7th of March, he would have found it equally fatal to the supposed bargain, founded on the offer intended to have been inserted therein. As Mactier never knew such an offer was intended to have been made, it is the same as if the offer had been inserted, but the letter had never reached him. He could not assent to an offer which he never heard of, and consequently there was no bargain.[1]

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Having arrived at the conclusion that Frith did not in fact sell his interest in the adventure to Mactier, as survivor he is entitled to the net proceeds of the brandy so far

[1] The decision of the Chancellor in this case is overruled in *Mactier v. Frith*, 6 Wen. 103. There held, that the offer to sell made by letter was an offer standing open for acceptance, at the time it was accepted, and the contract was then consummated, though the knowledge of the concurrence of wills, when the acceptance was made, was not known to the party who wrote the letter, and though he died *before notice* of the acceptance, by answer to the letter was received, but after the time of acceptance.

1829. as they can be traced and identified. He has a specific lien
 Miller on the fifty pipes sold by the administrators, and on the
 v. proceeds of the notes given for the other 150 pipes which
 Receiver of the Franklin Bank remained uncollected in the hands of Mactier at the time
 of his death; or on so much thereof as is necessary to satisfy the balance due him for disbursements on account of that adventure. The report must, therefore, be referred back to the master to be corrected accordingly. And the question of costs on these exceptions, and all other questions are to be reserved until the coming in of the master's amended report.

[*444] *IN THE MATTER OF THE PETITION OF SYLVANUS MILLER
 v. THE RECEIVER OF THE FRANKLIN BANK.

Demands, in reference to off-set, are considered due to and from the same persons, in the same right where the plaintiff may sue and the defendant be sued in their own names, without specifying any representative character, and where the party to the suit has a lien upon, or a legal right to the application of the fund when collected.

The public administrator of the city of New York is entitled to off-set against a debt due from him to a bank, a demand for deposits in the bank whether made in his own name or as public administrator, and also the bills of the institution in his hands.

March 3d.

THE petitioner stated that he was public administrator of the city of New York; that he had an account in the Franklin Bank, as public administrator; that he always had an interest personally in the moneys deposited to his credit in that account, and frequently, for convenience and safety, deposited money to that account which did not belong to him as public administrator; that on the morning on which the bank stopped payment, he drew out from the bank, on his account as public administrator, \$1,150 in bills, which he had in his hands at the time the injunction was served, leaving a considerable sum still due to him on

that account with the bank. At the same time the bank had a demand against the petitioner, which was secured upon real estate; that he was willing to pay the balance due from him, after deducting the balance due to him on the account, and the bills which he then held; and that the receiver had consented to refer the question as to his right of off-set to the decision of the court. The receiver put in an answer to the petition on oath, in which the material allegations in the petition were admitted, and submitted the whole subject to the decision and direction of the Chancellor.

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Miller

v.
Receiver of the
Franklin Bank

J. Platt for the petitioner.

S. A. Foot and *W. Kent* for the receiver

*THE CHANCELLOR :—The legal and equitable rights of the petitioner remain as they did at the time the injunction was served on the officers of the bank. No payments which he has made as public administrator out of his own moneys since that time can give him the right of set-off; and if such right then existed, it was not divested by the appointment of the receiver. The question then arises, whether the bills of the bank in his hands, and the moneys deposited to his credit as public administrator, at the time the bank stopped payment, could have been off set either at law or in equity, against the demand due the bank, if it had continued to do business.

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It is undoubtedly a general rule that demands to be off set at law, must be due to or from the same persons, and in the same right. But they are considered due in the same right where the plaintiff may sue, and the defendant may be sued, in their own names, without setting out or specifying any representative character, and where the party to the suit has a lien upon, or a legal right to the application or distribution of the fund when collected. Thus, a surviving partner is, in equity, only a trustee for himself and the re-

1829. presentatives of the deceased partner. Yet he may sue or
 Miller be sued in his own name, and debts due to or from him in
 v. his own right may be off set against debts due to or from
 Receiver of the Franklin Bank him as surviving partner. (*Slipper v. Stidstone*, 5 Durnf. & East, 498; *French v. Andrade*, 6 id. 582.) And in *Shipman v. Thompson*, (Willes' Rep. 103,) it was held, that an executrix might recover in her own name for moneys received to her use as executrix.

But this is a much stronger case. The petitioner does not administer by virtue of his office as public administrator, but by virtue of a regular letter granted to him as administrator of the estate in each particular case. He cannot sue or be sued as public administrator; but suits in his representative capacity are brought by or against him as the administrator of the particular estate to which such suit relates. If a suit was brought for this deposit in his name of public administrator, the addition would only be descriptive of the person, *but would not alter the rights of either party to the suit. There was no law directing or authorizing the public administrator to deposit moneys in the bank.[1] As between him and the bank, he stands in the same situation that an attorney or solicitor would, who had deposited in the bank for safe keeping the moneys collected for different clients, in one general account, in his name as attorney or solicitor, to be drawn out on his own checks when called for. In neither case could the bank object to pay the money to the depositor, or to allow it to be off set against a demand in favor of the bank, unless they had notice from the persons having an equitable claim thereon not to pay it. Neither would the right of off-set depend upon the question whether the depositor was personally liable, in case of loss by the failure of the bank. It is the duty of the petitioner, whether he is personally liable for the loss or not, to do every thing in his power to protect

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[1] A law has since been enacted on this subject. See 2 R. S. (4th ed.) 209, sec. 36.

the rights of those who may be interested in different portions of the moneys deposited ; and if he had a legal right of off-set against the debt due from him to the institution, he must stand in the same situation here as he did before the appointment of the receiver. The equities of all creditors of the institution being equal, the legal right must prevail.

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v.
Case.

I shall therefore direct the receiver to allow the petitioner to set off against the debt due from him to the bank the balance standing to his credit on the books of the institution at the time it stopped payment, either in his own name or as public administrator; and also the bills of the bank held by him at that time, provided the receiver is satisfied the petitioner is still the owner of the certificate given for those bills.

*ARTHUR AND WRIGHT v. CASE AND HARWOOD.

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As a general rule, persons who own lands on the different sides of a private stream, hold to the middle of the stream.

And where hydraulic works are erected on both banks, the owners of the works are each entitled to an equal share of the water. If the owner of the mills on either side attempts to deprive the other of the use of his share of the water, of which he has been in the quiet enjoyment, and thus to destroy his mills, a preliminary injunction will be granted, as the injury might be irreparable.

THE complainants are the owners of certain mills and March 3d. mill privileges on the lower falls at Ticonderoga, on the north side of the outlet of Lake George; and the defendants own mills and mill privileges on the south side of the same stream. There is an island in the middle of the outlet, and the main current of the stream naturally runs on the north side of the island. A dam is at present extended from the island to the south shore, on which the defendants' mills are situate; and a similar dam runs from the

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v.
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island to the north shore, by means of which the complainants' mills are supplied with water. In dry seasons there is not sufficient water in the stream to supply all the mills. The defendants claiming a right to have their mills first supplied, commenced building a dam from the island to strike the north shore some distance above the present dam, the effect of which would be to deprive the complainants' mills of water in the dry seasons, and turn the whole stream to the south of the island. The complainants obtained an injunction to restrain the defendants from building this new dam; and on the coming in of the answer, a motion was made to dissolve the injunction.

J. King and A. Van Vechten for the motion.

John V. Henry for the complainants.

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*THE CHANCELLOR:—There is no doubt of the jurisdiction of the court in this case, as the new dam would in a great measure destroy the complainants' valuable mills which have been in operation many years. The regulation of the use of water upon the different sides of a stream for hydraulic purposes, is so essential to the manufacturing interests of our country, and in fact to every branch of domestic industry, that it would be deplorable if any of these important establishments could be destroyed by any individual, or combination of persons, and the owners left to seek an uncertain remedy by an action for damages in a court of law.

It is a general principle that persons owning lands on the different sides of a private stream hold to the centre thereof, or to the middle of the water. *Ex parte Jennings*, 6 Cowen, 518.) And where hydraulic works are erected on both banks, if there is not sufficient water to afford a full supply for all, the owner on each side is entitled to an equal share of the water, or so much thereof as is necessary for his mills, if less than a moiety is sufficient. If the

owner of the mills on either side has been in the quiet enjoyment of the water privilege, and the other attempts to deprive him of it, and thus destroy his mills, a preliminary injunction is proper, as the injury might be irreparable. (*Robinson v. Lord Byron*, 1 Bro. Ch. R. 588; 2 Coxe's Cas. 4; S. C., *Lane v. Newdegate*, 10 Ves. 198.) In this case, the court must see that erecting the dam by the defendants, in the manner proposed, will entirely cast off the water from the complainants' mills, except when the stream is so high as to run over the dam. It, therefore, is necessary to look into the answer to see whether the defendants have the right, or whether there is any thing to take this case out of the general rule as to the use of the water.

Prior to July, 1793, the lands on the north side of the river belonged to S. Deal, P. Deal and Jane Nichol, under whom the complainants claim. P. Schuyler owned the lands on the south side, and also either owned or claimed the lands under the water to the north side of the stream. George Tremble was in possession of the premises claimed by Schuyler, under a lease from him for twenty one years from the 1st of May, 1788. On the 5th of July, 1793, Schuyler sold and *conveyed to S. and P. Deal and J. Nichol in fee a part of the land under the water of the river or outlet of Lake George on the north side, and extending about to the centre of the river, and embracing the whole or a great portion of the location of the dam intended to be erected by the defendants; saving and reserving to the grantor and his heirs and assigns a right to butt any dam or dams on both sides or shores of the river, as he or they might think proper; and subject, also, to the lease executed to Tremble. In this conveyance, Schuyler also covenanted with the grantees that after the expiration of the lease to Tremble, it should be lawful for them, or their heirs or assigns, to butt any dam or dams on both sides or shores of the river; which dam or dams, and the river or waters therein, might nevertheless be used and occupied by the grantor and

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 Case.

his heirs and assigns, on his or their paying such proportion of the expense and charges of erecting such dam or dams, and keeping the same in repair, as should be adequate to such use and occupation.

The defendants have derived title under Schuyler. And under the reservation contained in the grant from him to S. and P. Deal and J. Nichol, they claim the right to use so much of the water of the river as may be necessary for the use of any hydraulic works which may be erected by them on the south side, although it should take the whole, or stop it from flowing to the complainants' mills in time of low water. On a careful examination of the provisions of this deed, and the relative situation of the parties at the time it was made, I am satisfied that claim cannot be sustained. The right to butt dams on the lands of the grantees on the north bank of the river is not technically correct as a reservation, because it was no part of the thing granted. It must be construed in the same manner as though the deed was executed by the grantees and this was inserted as a covenant on their part. Before the execution of that deed, neither party had a right to butt his dam upon the lands of the other on the opposite side of the stream; but for the accommodation of each, a reciprocal right was intended to be given. There is nothing in the deed from which a reservation of more than a moiety of the water can be inferred, and the grant must *always be construed most strongly against the grantor. From the then situation of the country, it was not probably contemplated by either that there ever would be a deficiency of water. The parties are entitled to participate equally in the use of the water; and if either draws more than a fair proportion, or if it is necessary to excavate in the bed of the river to give the defendants a due proportion, the manner of exercising the right, and the extent and nature of the excavation, must be settled under the direction of the court, on the report of a master, or in the mode adopted by the

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Master of the Rolls in *Martin v. Stiles & Sherman*, (Mosel. Rep. 144.)

1859.

Suffern
v.
Johnson.

The motion to dissolve the injunction is denied, with costs.

SUFFERN v. JOHNSON AND PETERSON.

After a decree for the foreclosure and sale of mortgaged premises, the court will control and regulate the proceedings and manner of sale, so that no injustice shall be done to either party.

Where mortgaged premises are an inadequate security for the debt, and the mortgagor is irresponsible, the court, although the entire mortgaged debt is not due, will order the whole of the premises to be sold, or so much as is necessary to pay the whole debt and costs, unless the defendant pays to the complainant the sum which will become due before the sale, or gives ample security for payment of the residue, when it becomes due.

Mortgaged premises should be sold either together or in parcels, as will be best calculated to produce the highest sum.

THIS was a bill of foreclosure. At the last term of this March 17th. court a regular decree was entered in this cause, referring it to a master to compute the amount due to the complainant on his bond and mortgage, and for a sale of the premises on the coming in and confirmation of the master's report. *W. S. Johnson*, who had appeared in the cause, had regular notice of the proceedings before the master, and the report was confirmed. He afterwards presented his petition, setting forth that only a part of the mortgage money had become due; that he was the purchaser of the mortgaged premises, which were so situated that they might be sold in parcels. And he prayed that only so much of the premises might be sold *as would be sufficient to pay the amount now due, with costs.

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The application was opposed on affidavit, showing that the premises were insufficient to pay the whole amount of the mortgage; that the defendants had committed waste

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 Suffern
 v.
 Johnson.

thereon ; and that the property would sell for a higher sum if sold together.

W. A. Seeley, for the complainant.

S. M. Fitch, for the defendant Johnson.

THE CHANCELLOR:—In cases of mortgage sales, this court will control and regulate the proceedings so that no injustice shall be done to either party. And the court may order the whole or a part of the mortgaged premises to be sold, as shall be most conducive to that end. It is not a matter of course to order the whole property to be sold where only part of the mortgage money is due; but it may frequently be necessary, to prevent injustice. If the person in possession is not responsible for the debt, and the premises are not a sufficient security, the sale of two-thirds of the property might be necessary to pay a moiety of the debt which had fallen due. And the defendant would retain possession of the residue of the property and put the rents and profits in his own pocket until the other instalments fell due, leaving the complainant remediless as to a great part of the remainder of his debt. In such cases, the whole of the premises, or so much as is necessary to pay the whole debt and costs, should be sold, unless the defendants choose to pay the amount of the instalment which is due, before the sale, or will give security that the residue of the mortgage money shall be paid when it falls due.[1]

In *Campbell v. Macomb*, (4 John. Ch. Rep. 584,) all the money which had become due was paid before the application to this court to stay the proceedings.

The defendant Johnson may have an order directing the master not to proceed and sell, if the amount now due and the costs are paid before the day of sale, or to sell only so much of the property as will satisfy that amount, provided

[1] See 2 R. S. (4th ed.) 357, 358, secs. 69, 70, 71.

the *defendants, or either of them, give to the complainant sufficient security, to be approved of by the master, that the sums yet to fall due shall be paid. But as the proceedings on the part of the complainant have been perfectly regular, the defendant Johnson must pay the costs of resisting his application.

1839.

Thompson
v.
Graham.

It is the duty of the master in all cases, unless otherwise specially directed, to sell the premises either together, or in parcels, as he shall think best calculated to produce competition and enhance the value on the sale.

THOMPSON, EXECUTOR, &c. v. GRAHAM AND OTHERS.

Where a suit was commenced in this court in consequence of an inequitable defence interposed to a suit at law for the same cause of action, the court refused to compel the complainant to elect in which suit he would proceed, as long as no attempt was made to prosecute the suit at law.

H. BLEEKER, for the defendants, upon an affidavit that March 23d. the complainant had brought a suit at law for the same cause of action for which this suit was brought, moved that he elect in which cause he would proceed, and that he pay the defendants' costs in the other cause.

J. Hoyt, contra, read an affidavit, showing that the suit at law was first commenced ; that the defendants interposed an inequitable defence to that suit, and that the bill in this cause was filed in order to get rid of that inequitable defence ; and that no proceedings have been since had in the suit at law.

THE CHANCELLOR :—There is no ground for this application. The complainant is not proceeding in both courts at the same time. It appears from his bill that the conduct of the defendants has driven him into this court ; and

1839. since that time he has taken no steps at law. If he should
 Duffy attempt to proceed at law, it will then be in time to apply
 v. and compel him to elect. He has been compelled, on this
 Buchanan. application, to come here to resist an improper claim for
 costs; and the motion must be denied with costs to be paid
 by the defendants.

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*DUFFY AND OTHERS v. BUCHANNAN AND OTHERS.

Where a person was entitled to a share of the personal estate of an intestate, and the agent of other persons entitled also to portions of such estate had received all the proceeds of the same and remitted the whole to his principals, and afterwards there came into his hands a portion of the proceeds of the real estate which belonged wholly to his principals, it was held that such person, whose share of the personal estate had been so paid by such agent to his principals, had an equitable claim upon the proceeds of the real estate in the hands of the agent.

The agent is not liable for the payment to his principals of the share of the personal estate which did not belong to them, having paid the same without notice.

The remedy of the person entitled to the share of the personal estate so paid by mistake to the principals, is against such principals or the personal representatives of the intestate.

March 25th.

IN 1820, George Duffy, a resident at Philadelphia, being possessed of real and personal property there, died intestate and without issue, leaving his widow and a brother and sister of the full blood, and one brother and two sisters of the half blood, him surviving. Under the laws of Pennsylvania, one-half of the personal property belonged to the widow, and the other half to the five brothers and sisters in equal proportions; and the real estate descended to the brother and sister of the full blood, subject to the widow's right of dower. The brothers and sisters all resided in Ireland. Those of the full blood, claiming the whole of the proceeds of the real and personal estate except the widow's

share, sent a power of attorney to the defendant Buchannan, the British consul at New York, to receive and transmit to them the proceeds of the property. In December, 1820, he received \$1,900 for the proceeds of the personal estate, which he remitted to them, after deducting \$100 as a compensation for his trouble and commissions. In July thereafter, he received \$624 95 for the proceeds of the real estate; but before this was remitted, he had notice from the brother and sisters of the half blood of their claim, and was forbidden to pay over the moneys in his hands. In February, 1824, he paid to Charles Duffy, the brother of the half blood, \$388 87; the latter indemnifying him against the claims of any of the family in respect of the same; and the residue, \$236 08, still remains in the hands of Buchannan. The bill was filed by the two sisters of the half blood of the intestate; it was taken as confessed against the brother and sister of the full blood, and the brother of the half blood; and the cause was heard on pleadings and proofs as against Buchannan.

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Duffy
v.
Buchannan.

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D. Selden, for complainants.

G. Brinckerhoff, for Buchannan.

THE CHANCELLOR:—The consul having received the proceeds of the personal estate as the agent of the brother and sister of the full blood, and paid it over to his principals without notice of the claim of the other parties, he is not liable to them for that amount. Their remedy is against the principals or against the personal representatives of the intestate who has paid over the money to the wrong parties. (2 Livermore, 261.) But the principals having received more than their share of the personal estate, the brother and sisters of the half blood had an equitable claim upon the proceeds of the real estate in the hands of the same agent. There must be a decree that the defendant Charles Duffy refund to Buchannan the amount received

1829.
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 v.
 Crain.

by him over and above one-third of the \$624 95; and that the latter pay one-third of the last-mentioned sum to each of the sister of the half blood, and the brother and sisters of the half blood must have a decree against the brother and sister of the full blood severally, for the payment of the residue of their respective shares of the personal estate, with interest thereon from the time it was received by their agent. As it does not appear that the brother and sister of the full blood had been applied to for the payment before this suit was commenced, neither they or Buchanan are to be charged with the complainant's costs. But Buchanan must have a decree over against his principals for the costs to which he has been subjected by their mistake

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*VAN HORNE v. CRAIN.—CRAIN v. VAN HORNE.

Covenants of warranty and to convey contained in a lease of real estate, run with the land, and are binding upon the heirs and assignees of the lessor. A subsequent purchase by the lessor of an outstanding claim against the premises will enure to the benefit of the lessee by virtue of the covenant of warranty.

The same result follows where the purchase is made by an assignee of the reversion.

An assignee of an undivided moiety of leasehold premises, can maintain an action in his own name upon a covenant of warranty contained in the original lease.

Whether he could maintain an action upon a covenant to convey without joining with the assignee of the other moiety? *Quere.*

But if the assignee of one moiety should unconscientiously refuse to join with his co-tenant in any act which would be for the common benefit of their estate, Chancery will compel him to join, or to permit the co-tenant to do it for his own benefit, if it can be done without injury to the estate.

Separate instruments executed at the same time, and relating to the same subject matter, may be construed together and taken as one instrument.

March 23d.

THIS was a contest relative to a mill site and mill privileges in the town of Danube. The mills are situated on lot

No. 17, and the water which supplies them comes from a spring on lot No. 18 in McNeil's patent. On the 4th of October, 1808, the title to lot No. 18 was in Jacob Conklin. Two-sixths of lot No. 17 belonged to James A. Stewart, one-sixth to Alexander Stewart, one-sixth to William R. Stewart, one-sixth to W. Benson, and the remaining one-sixth to Maria, now the wife of J. P. Decatur, subject to the life estate of her father, Thomas Ten Eyck, as tenant by the curtesy. On the day above mentioned, J. Conklin and wife conveyed to J. A. Stewart, A. Stewart, W. R. Stewart, W. Benson and T. Ten Eyck, in fee, four acres of lot No. 18, including the spring and the stream running therefrom. On the following day, J. A. Stewart and T. Ten Eyck for themselves, and as attorneys for A. Stewart, W. R. Stewart and W. Benson, leased lot No. 17, with the benefits, liberties and *privileges thereto belonging or appertaining, to J. Williamson and J. Williamson, junior, for life, at an annual rent of \$100; with a covenant on the part of the lessors to convey to the lessees or their assigns, on receiving \$15 per acre, at any time during the term. There was also a general covenant for quiet enjoyment of the premises, against the lessors and all other persons. The lease was not signed and sealed by J. A. Stewart and T. Ten Eyck, in the names of those for whom they professed to act as attorneys. By a covenant indorsed on the lease at the same time, and signed and sealed by J. A. Stewart and T. Ten Eyck, reciting that they had purchased the four acres "containing the water course to the within mill seat and lot of land," for £18 10s. they promised to relinquish the four acres to whoever paid the sums mentioned in the lease, on receiving the purchase-money by them paid to Conklin, with lawful interest from the date of the lease. The Williamsons leased two small lots on No. 17, for a fulling mill and a carding machine, the interest in which leases, by divers mesne conveyances, became vested in Crain. Afterwards, on the 6th of April, 1806, the Williamsons conveyed to Richard and Daniel Van Horne the

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equal undivided half of all their interest and claim in and to lot No. 17, and the four acres in No. 18, under the lease and the agreement indorsed thereon. The remaining half, by divers mesne conveyances, afterwards became vested in Crain. Benson died in 1805, and his interest in the premises passed by his will to A. Stewart. On the death of the latter in 1808, his interest in the premises descended to his son A. J. Stewart, and his daughter Elizabeth, wife of J. K. Hamilton, subject to the dower right of their mother Elizabeth Stewart. T. Ten Eyck died in the same year, and his interest went to Mrs. Decatur. J. A. Stewart died in 1815, and his interest descended to his sons W. J. Stewart and J. J. Stewart. On the 29th of July, 1815, William R. Stewart, A. J. Stewart and J. K. Hamilton and wife, Elizabeth Stewart the widow, J. P. Decatur and wife, and W. J. Stewart and J. J. Stewart, conveyed to Crain lot No. 17, and the four acres of lot No. 18, in fee; and he gave them a bond to indemnify them and each of them against the claim of the Van Hornes.

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*In 1824, D. Van Horne and the heirs of R. Van Horne filed their bill against Crain, containing a general prayer for relief, but no specific relief was asked for therein. The defendant put in his answer, and filed a cross bill, setting forth many of the facts which were not mentioned in the original bill, and praying that the rights and interest of the parties in lot No. 17 might be ascertained, and partition made thereof; that an account be taken between the parties as to the rents and profits, &c., and for general relief. The cause was heard upon the pleadings, and a written stipulation of the parties as to the facts.

J. V. Henry, for R. Crain:—In this case both parties claim from the same persons. J. A. Stewart and T. Ten Eyck had no authority from the other joint owners to convey the premises in question to the Williamsons. Their lease, therefore, only passed their own interest. Crain has purchased, and is entitled to the entire reversion of the

whole premises, after the determination of the life estate of the Van Hornes. The covenants of warranty, and to convey, contained in the lease and agreement to the Williamsons, are indivisible. The Van Hornes having purchased only an undivided moiety of the premises from the Williamsons, have therefore no rights under those covenants. The court cannot modify these covenants, and convert them, being covenants for the whole, into covenants for parcels. Crain was not bound to unite with the Van Hornes in the purchase of the fee under the original lease and agreement. No action at law could be sustained on this agreement, and therefore this court cannot decree a specific performance. (*Palmer v. Edwards*, Dougl. 187, n. 59; 1 Saund. 287, and note; *Dumper's case*, 4 Coke, 119, 120; 8 Com. Dig. 128, Cond. O. 2; *Spencer's case*, 5 Coke, 16; Bridgman's Index, tit. *Agreement*, 38; 2 Freem. 216, 217. id. 246.) This court has no power to vary the contract; (*King v. Wightman*, 1 Anst. 80; *Jordan v. Sawkins*, 4 Bro. Ch. Cas. 477;) nor to decree a specific performance of the contract when varied. (*Earl of Worrington v. Langham*, Pre. in Chan. 89; *Champernoon v. Gubbs*, id. 126.) Crain being entitled to a *life estate in seven-twelfths, and to the entire reversion of the whole of the premises in question, is entitled to a decree for a partition of the estate. Crain, in his purchase of the reversion, was not guilty of any fraud upon the Van Hornes.

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J. Platt, for Van Hornes:—Although J. A. Stewart and T. Ten Eyck signed the conveyance to the Williamsons simply in their own names, and not in the names of the other joint owners; yet this is only a technical legal objection, and equity will intend that done which should clearly have been done. In 1814, Crain agreed to purchase from the Van Hornes their moiety of the premises. But he afterwards refused to execute the agreement, and purchased the whole of the reversion. He therefore possessed full knowledge of the title and claim of the Van Hornes under the original lease and agreement. The Van Hornes had

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made extensive improvements upon the property; and the purchase by Crain of the reversion and the taking advantage of the mistake in the signature of the original lease was a fraud upon the Van Hornes. But if the lease and agreement to the Williamsons were defectively executed, the defect was obviated by the subsequent ratification of the owners, who did not sign those instruments. The Van Hornes possessing equitable rights, have a remedy in Chancery; and Crain having purchased with notice of their rights, has become a trustee for them. A parol authority to the persons who executed the original lease from the other joint owners, was sufficient, if clearly proved. (*Wilkie v. Holmes*, 1 Schoal & Lef. 60, note.) Equity will support defective conveyances, made for a valuable or meritorious consideration. (*Minturn v. Seymour*, 4 John Ch. R. 497; *Thompson v. Atfield*, 1 Ver. 40; *Longdale v. Longdale*, id. 456.) If Crain be considered a trustee, there can be no difficulty in decreeing a conveyance of the fee according to the terms of the original lease and agreement.

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THE CHANCELLOR:—The lease to Williamsons, and the agreement indorsed thereon, being executed at the same time, and in relation to the same subject matter, may be construed together and taken as one instrument.[1] (*Jackson v. *Dunsbagh*, 1 John. Ca. 91.) Such was undoubtedly the intention of the parties, and this court ought to carry that intention into effect. The execution of the lease and agreement probably was defective. By some inadvertence I have not been furnished with the original instrument, or copies thereof. But I understand from the pleadings, that the lease, in its commencement, purported to be made between J. A. Stewart and T. Ten Eyck, for themselves, and as attorneys for A. Stewart, W. R. Stewart and W. Benson, of the first part, and the Williamsons of the second part;

[1] See 2 Cow. & Hill's Notes to Phil. Ev. note 265, p. 518; and authorities there cited

and that it was signed and sealed J. A. Stewart and T. Ten Eyck in their own names only, without any thing on the face of the instrument to show an intention to sign and seal it as attorneys for the other persons named. (9 Coke, 76 b; *Bogart v. De Bussy*, 6 John Rep. 94.) Ten Eyck had only a life estate as tenant by the curtesy, in one-sixth of lot No. 17, and the lease does not profess to convey the interest of his daughter, who probably was under age at the time.

But in the view I have taken of this subject, the rights of the parties do not depend upon the extent of the interest which was actually acquired by the Williamsons under the lease of October, 1803. It was a valid lease of all the interest which J. A. Stewart and T. Ten Eyck then had in the premises. The lease contains a general covenant of warranty against the lawful claims of all persons. This covenant and the covenant to convey run with their interest in the land, and are binding on their heirs and assigns.[1] If the assignees of the Williamsons could maintain an action on either of these covenants, against J. A. Stewart and T. Ten Eyck, they would have the same remedy against Crain as the assignee of the reversion of two-sixths of lot No. 17, and two-fifths of the four acre lot. If Stewart and Ten Eyck had purchased in the outstanding claim of the other persons, it would have enured to the benefit of their lessees by virtue of the covenant of warranty in the lease. (*Jackson v. Stevens*, 13 John. Rep. 316; *Jackson v. Hubble*, 1 Cowen's Rep. 618.) And the same effect must be produced when it is purchased in by the assignee of the reversion, who is bound by the covenants *contained in the lease. (Per Holt, C. J., 6 Mod. Rep. 258, and Kent, J., 1 John. Ca. 91.)

An assignee of an undivided moiety of the leasehold

[1] In *Norman v. Wells*, 17 Wen. 136, Mr. Justice Cowen discusses at large the doctrine of inherent covenants, running with the land, and of an assignable character in contra-distinction to those which are purely personal. See also 4 Kent, 97, 100.

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premises, from the Williamsons, could maintain an action on the covenant of warranty contained in the lease; but it is at least doubtful whether he could maintain an action on the covenant to convey; without joining with the assignee of the other moiety. The covenant of warranty relates to every part and portion of the premises, but the covenant to convey relates only to the whole. If the assignee of one moiety unconscientiously refuses to join with his co-tenant in doing any act which is for the benefit of the estate of both, a court of equity will compel him to join, or permit the co-tenant to do it for his own benefit, provided it can be done without injury to either. Such being the equity of the Van Hornes, as the assignees of a moiety of the premises under the lease and agreement, Crain could not defeat it by the purchase of the reversion.

He must, therefore, elect to convey to them a moiety of the premises, subject to the sub-leases of the fulling mill and carding machine lots, on receiving one-half of the purchase-money specified in the lease and agreement; or to convey the whole, subject to those sub-leases, they paying or securing the payment of the purchase-money in the manner mentioned in the lease and agreement. And there must be a reference to a master to state an account between the parties, of the rents and profits of the premises received by, or chargeable to them respectively; and of all sums paid by, or due to either for rent or repairs, or for other expenditures for the benefit of the leasehold estate. If Crain elects to convey a moiety of the premises only, the master must also examine and report whether the premises are so situated that a partition thereof cannot be made without great prejudice to the owners thereof; and with liberty to make a separate report on that subject. And all questions of costs and other questions and directions must be reserved.

1839.

Pitney
v.
Leonard.

*PITNEY v. LEONARD and LEONARD.

Where a person enters into possession of land under a conveyance from one claiming the title, such title is presumed to be good until the contrary is shown.

Where a party has sufficient to put him on inquiry, it is equivalent in equity to actual notice

IN 1813, the defendant John Leonard purchased of J. T. Pitney 235 acres of land on the west end of lot No. 4, in Ovid, and went into possession thereof. In 1816, he purchased other 235 acres of the complainant, in the same lot adjoining the first purchase, for \$3,800, and gave back a bond and mortgage for the purchase-money. The mortgage was never registered; and shortly after the last purchase, J. Leonard conveyed 116 acres of the mortgaged premises with warranty to B. Bryant. In 1819, S. W. Baldwin claimed the whole of lot No. 4, and brought ejectment suits against J. Leonard and others who were in possession. The suit against J. Leonard was defended by him, and was pending until May, 1825, when J. Leonard entered into an arrangement with Baldwin, under which a *cognovit* was given, and a judgment entered in the ejectment suit. An execution was immediately issued, and J. Leonard and B. Leonard his son who was living on the land as tenant to his father, were formally turned out of possession. As soon as Baldwin was in possession, he executed a quit claim deed for the 116 acres to the heirs of Bryant, and another to B. Leonard for the remaining 854 acres; the latter paying \$200 in cash, and securing the payment of \$550 more, in full for the purchase-money.

The complainant afterwards filed his bill in this cause to set aside the judgment and proceedings thereon as fraudulent against him, and to foreclose the mortgage against the 119 acres of the mortgaged premises which were not included in the deed to Bryant. The bill was taken as con-

1829. <hr/> Pitney v. Leonard.	fessed against J. Leonard. B. Leonard put in a plea, which was *overruled, and he then answered the bill; and the cause was heard on pleadings and proofs as against him.
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A. Gibbs, for the complainant.

W. Kent for defendant B. Leonard.

THE CHANCELLOR:—I have not thought it necessary to examine the question whether Aaron Pitney had the legal title to the land at the time he conveyed to J. Leonard. The latter went into possession under that title, which is to be presumed good until the contrary is shown. From the testimony adduced, there is no doubt the judgment in the ejectment suit was confessed for the purpose of destroying the lien of the complainant's mortgage. It was fraudulent and void as against him; and it is hardly possible to believe B. Leonard was not acquainted with the real nature and object of the transaction. He had at least sufficient to put him on inquiry, and that in equity is equivalent to a notice.[1] He admits that he knew of the bond and mortgage, and the judgment which Pitney had obtained against his father on the bond. He knew his father had been contesting the title against Baldwin for years; and as the lands lay within sight of the court house, he could not have supposed that they had been recovered on a trial in the usual way. The judgment was filed and docketed at Utica on the 13th of May. The execution was delivered to the sheriff on the 16th; and on the same day, after allowing himself to be turned out of possession with all due formality on an execution against his father, he purchased the 354 acres of land, worth more than \$8,000, for the trifling consideration of \$750; and both himself and father

[1] *Peters v. Goodrich*, 3 Conn. 146; *Booth v. Barnum*, 9 Conn. 286; *Hawley v. Cramer*, 4 Cow. 717; *Brush v. Ware*, 15 Pet. 112; *Jackson v. Cadwell*, 1 Cow. 622; *Tuttle v. Jackson*, 6 Wen. 218; see also Am. Ch. Dig. by Waterman, tit. Notice.

return back into possession thereof. Under all these circumstances, he either knew the real nature and object of these proceedings or remained wilfully and intentionally ignorant. The judgment in the ejectment suit, and the proceedings and change of possession of the mortgaged premises under the same, must, therefore, be declared fraudulent and void as against the complainant. There must be a reference to a master to compute the amount due on the bond and mortgage, and the usual decree for the sale of the *119 acres of the mortgaged premises, on the coming in and confirmation of the master's report; and that the purchaser be let into possession on production of the master's deed, and a copy of the order confirming the report of the sale. And if the mortgaged premises do not sell for sufficient to pay the costs, over and above the amount reported due, with interest, the costs, or so much as is deficient, must be charged personally on the defendants.

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v.
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F. CARTER, BY HER NEXT FRIEND v. J. K. CARTER.

Where the wife was entitled to an equitable allowance out of the separate estate of her husband, who was a lunatic, but of whose person and estate no committee had been appointed, the court ordered her separate property to be transferred to the assistant register, and that the income thereof be paid to her upon her separate receipt, until the further order of the court.

In this case the wife, by her next friend, filed a bill May 5th. against her husband to secure an equitable allowance out of two bonds and mortgages and certain stocks bequeathed to her by her father. The husband being a lunatic, the bill also prayed that a committee of his person and estate might be appointed by the court. The husband put in his answer by a guardian *ad litem*, appointed by the court for that purpose, and the facts were ascertained by a reference to a master.

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v.
Carter.

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THE CHANCELLOR :—Upon the principle of the decision in *Kenny v. Udal & Kenny*, (5 John. Ch. Rep. 464,) the complainant has a claim in equity to so much of the property devised to her by her father as is necessary for her support and maintenance, and the husband is not entitled to assign the two bonds and mortgages, or the insurance stock in the bill mentioned, or to collect the principal or interest of the mortgage, or receive the dividends on the stock, until a suitable provision is made by him for her support. But as he is not now in a situation to make such provision, and cannot transact business until a committee is appointed for him, there must be a decree declaring the right of the *complainant as above, and directing an assignment and transfer of the said two bonds and mortgages and the said insurance stock to the assistant register of this court, to abide the further order thereof; and that he receives the interest on the bonds and mortgages, and the dividends on the insurance stock accruing from time to time, and pay the same over to the complainant on her separate receipt or order; and it is declared that the transfer and assignment of the said bonds and mortgages, and the twenty-two shares of Globe insurance stock to the said assistant register, by the said Frances Carter and by William T. McCoun, as guardian *ad litem* for the defendant, shall be valid and effectual to transfer the same as if the defendant was of sane mind, and had personally joined in such assignment.

The application for the appointment of a committee for the defendant to take care of his person, and of his other property, cannot be granted in this suit. It must be on petition, and a commission must be executed in the usual manner.

1829.

THE BANK OF PLATTSBURGH AND OTHERS v. PLATT AND
OTHERS.

Bank of
Plattsburgh
v.
Platt.

Where a defendant in a bill of foreclosure, who was not personally liable for the mortgage debt, filed a cross bill and set up a defence which was not ultimately sustained, and thus in the mean time kept possession of and received the rents and profits of the mortgaged premises, and which premises, upon a sale thereof, were found insufficient to pay the amount due, he was decreed to pay the extra costs occasioned by his defence.

THE original bill filed in this cause was for the fore- May 5th.
closure of a mortgage given by the defendant Platt, which
was a lien upon his hands only, he being by the terms of
the mortgage expressly exempted from personal liability
for the debt. After the filing of the bill, Platt conveyed
the premises to Anderson, and set up that conveyance in
his answer, and in a cross bill to defeat the foreclosure.
The late Chancellor decided against the legality of the de-
fence, and ordered a sale of the mortgaged premises; but
by means of this defence the *mortgagees were kept out of
the possession, and were prevented from selling the prem-
ises, for about one year longer than they otherwise would
have been.

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After the premises were advertised under the decree, the
defendant Platt applied for a longer time and more extended
notice of sale. This was granted on condition that he
paid the rents and profits of the premises during the delay,
if sufficient should not be raised on the sale to pay the debt.
The premises were afterwards all sold, leaving nearly thirty-
six thousand dollars still due to the complainants. A refer-
ence was made to the master, by consent of the parties, to
ascertain the amount of the rents and profits of the premises
during the time the sale was suspended under the last order.
The cause was heard upon the master's report of the sale,
the report as to the rents, and exceptions of both parties
thereto, and upon the equity reserved in the original
decree.

1829.

Bank of
Plattsburgh
v.
Platt.

J. V. Henry, for the complainants.

P. S. Parker, for the defendant Platt.

THE CHANCELLOR :—I am satisfied, on looking into the master's report, as to the rents and profits of the premises during the time the sale was suspended, that he has decided correctly as to the amount, and that under the order of the 5th of April, 1827, Platt is answerable for the rents and profits of the whole premises. As that order for the postponement of the sale was made for the exclusive benefit of Mr. Platt, he should pay all the extra costs occasioned thereby. The whole of the costs of the cross suit, and all the costs in the original suit, which were produced by the defence made by the defendant Platt, must also be paid by him. Although he may have supposed he had a valid defence to the suit for foreclosure, he put in that answer and filed his cross bill at the peril of costs. By the original mortgages and covenant, the complainants had a right to the possession of the premises, if default should be made in payment of the instalments. The setting up of this defence, and protracting the litigation, has deprived them of the rents and profits accrued in the

[*466] *mean time, to the amount of several thousand dollars, of which he has had the benefit. There cannot, therefore, be any injustice in charging him with the extra costs which he has unnecessarily made.

A decree must be entered, giving to the purchasers under the decretal order of sale respectively, and their heirs and assigns, the full benefit of all the covenants of warranty, &c., in the original mortgages, and they are declared to run with the land and to enure to the benefit of such purchasers. The defendant Platt must also be decreed to pay \$479 56, reported due for rents and profits, with interest thereon from the 24th of August, 1827, the date of the master's report, which report is confirmed. He must also be decreed to pay all the costs of the cross suit, and the costs which were made by his answer and defence in the original suit, to be

ascertained and taxed by one of the taxing masters of this court; and also the sum of \$142 10, for the extra expense of adjourning the sale as reported by the master.

1829.

Bank of Utica
v.
Dill.

THE BANK OF UTICA v. DILL AND CUMPSTON.

Where a sheriff, after collecting money on an execution, died insolvent, without paying over the same, and no person administered upon his estate, it was held that no suit could be sustained in Chancery against the sureties of the sheriff upon his bond, to enforce the payment of the amount so collected by him.

If the judgment creditor has any remedy in such cases, the Supreme Court alone can furnish relief.

THE defendants were the bail of S. W. Hughes, late sheriff of Cayuga, who collected the amount of an execution in behalf of the complainants, and died before the money was paid over. No person administered on the estate of the sheriff, and the bill in this cause was filed to compel the bail to pay the amount collected by the sheriff. The defendants demurred to the bill for want of equity.

J. C. Spencer, for complainants:—The complainants have a remedy in Chancery against the defendants, upon their bond, *for the malfeasance of their principal, the sheriff. The bond is a security for creditors, as well as for the people. (1 R. L. 419, sec. 2.) The right being clear, and there being no remedy in this case at law, Chancery has power to afford the relief intended by the statute. The 6th section of the act provides the terms upon which the Supreme Court shall direct the bond to be prosecuted at law. This is merely directory of the remedy, and is no qualification of the right. Without this provision, the only remedy would have been in Chancery. This section does not provide for all the cases of injury. Thus, by the 5th

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Bank of Utica
v.
Dill

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section, the defaults of the under sheriff, after the death of the sheriff, are declared breaches of the condition of the bond. But the bond cannot be prosecuted at law for the defaults of the under sheriff, because no judgment can be obtained against the deceased sheriff, which is an indispensable requisite to authorize the Supreme Court to direct the prosecution of the bond. Nor can judgment be recovered against the representatives of the deceased sheriff, for the defaults of the under sheriff. Here, then, is a case in which the Supreme Court cannot afford a remedy. So in the present case, the sheriff being dead, no judgment can be obtained against him; nor will any action lie against his personal representatives. (*Martin v. Bradley and others*, 1 Caines' R. 124; *Franklin v. Low & Swartwout*, 1 John. R. 396.) And if such action would lie, there is no executor or administrator against whom it can be brought. The complainants being a corporation, cannot, if they were required, take out letters of administration. There will therefore be an entire failure of justice in this case, unless the court can grant relief. The principle contended for here is laid down in Mitford's Pl. 106, 7, that where a right is given by a statute in express terms, and the courts of common law cannot afford a remedy, Chancery will interfere. *Edgell v. Haywood & Dawe*, 3 Atk. 352; *Jenkins v. De Groot*, 1 Caines' Cas. in Error, 122. *Phillips v. Thompson*, 2 John. Ch. R. 418; *In the Matter of McKinley and others*, 1 John. Cas. 137.) It has been frequently held, that a *cestui que trust* may use the name of the trustee to recover money, or to foreclose a mortgage; and also that any person beneficially interested in a contract *may sue and enforce it. (*Jackson v. Delancy*, 11 John. R. 365; *Attorney-General v. Meyrick*, 2 Ves. sen. 45; *Shepard v. Shepard*, 7 John. Ch. R. 63; *Skinner v. Phillips and others*, 4 Mass. R. 68; *Corry v. Williams*, 9 id. 117; *People v. Dunlap*, 13 John. R. 439; *Archbishop of Canterbury v. House*, Cowp. 140.) Courts of equity lean in favor of making a bond, or other instrument, a trust for creditors, and of enforcing such trust. (1 Eq. Cas. Ab. 93 k;

Moses v. Murgatroyd, 1 John. Ch. R. 129; *Kip v. Bank of New York*, 10 John. R. 63; *Parsons & Cole v. Bridglock*, 2 Vernon, 608.) 1829.
Bank of Utica
v.
Defl.

A. Van Vechten, for defendants, contended that the defendants in this case were not liable to the complainants; that the terms of the statute had not been complied with. The amount of the plaintiffs' demand, and the default of the sheriff, had not been ascertained by a judgment against him. Unless this is done, the Supreme Court have no power to direct a prosecution of the bond. The statute specifically provides the manner in which the bail are to be made liable. It defines the nature and scope of their obligation. Until the default of the sheriff is judicially ascertained, the bond is not forfeited; and when forfeited, it is suable only in the name of the people at law, under the direction of the Supreme Court. (*People v. Spraker*, 18 John. R. 390.) The statute in terms provides, that there shall be but one suit upon the bond, although there be several defaults; and the judgment, when recovered, is to stand as security in case of other defaults. The obligation of sureties cannot be varied in any respects, either as to its terms, or the manner of enforcing it when that is specifically prescribed. (*Rathbone v. Warren*, 10 John. R. 587.) The defendants are liable only according to the provisions of the statute.

THE CHANCELLOR:—It is not necessary for the decision of this cause to inquire whether the bail can be liable in any case before a recovery has been had against the sheriff or his personal representative. The decision of the Supreme Court in *The People v. Spraker & Yates*, (18 John. *Rep. 890,) when examined carefully, does not seem to go that length. It was evident in that case that the directions of the statute might have been complied with, and the breach of the condition of the bond which was there assigned was one for which the original sureties were not liable. If a recovery against the sheriff is necessary in all cases before

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1829.

Harwood
v.
Kirby.

a suit can be sustained against his sureties, there is no remedy in this case, either at law or equity, because the statute has made no provision for a proceeding against his personal representative.

Without expressing any opinion on the question whether the Supreme Court would permit the bond to be put in suit upon a proper application, showing that the sheriff had collected the money and died insolvent, and that there was no personal representative against whom a suit could be prosecuted, I am satisfied if the complainants have any remedy against the bail, the Supreme Court is the proper tribunal to afford that relief. It was evidently the intention of the legislature to give to that court power to administer relief to the parties injured by the default of the sheriff, to the full extent to which the sureties are liable. The condition of the bond is broad enough to reach every possible case where the bail ought to be made liable. And if they are liable at all, it must be by a suit on the bond in the name of the people, under the equity of the fifth section of the act.

The demurrer must, therefore, be deemed to be well taken in this case.

HARWOOD AND OTHERS v. KIRBY.

The right of an incumbrancer cannot be affected by a sale of lands in partition, neither can he be made a party to the suit.

If the lands are divided, the lien of the incumbrance, after the division, will be confined to the share allotted to the party against whom the incumbrance is held.

If the lands are sold, the purchaser will take the premises subject to the lien of the incumbrance upon the undivided share.

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*The Revised Statutes have altered the law on this subject, and have authorized the court to decree a sale, which will give the purchaser a perfect title, discharged from all liens and incumbrances.[1]

[1] 2 R. S. (4th ed.) 585, sec. 57.

THE complainants filed a bill for partition in this cause, setting forth, among other things, that the share of the defendant was incumbered by two legacies or annuities charged thereupon, and by a judgment and a mortgage; and that the premises were so situated that a partition thereof could not be made without a sale, and praying a sale of the premises and division of the money, deducting from the share of the defendant the amount of the incumbrances. The defendant in his answer admitted the incumbrances to have been created as stated in the bill, but insisted that he did not hold the premises subject thereto, but that the same were only contingently liable therefor. A reference was made to a master to report whether partition could be made, and to ascertain and report upon the title of the different parties in the premises; and if he should be of opinion that partition could not be made, to report the incumbrances on the respective shares, without prejudice to the rights of the parties. The cause was submitted on bill and answer, and the master's report.

1829.

Harwood

v.

Kirby.

May 19th.

J. King for the complainants.

J. L. Wendell for the defendants.

THE CHANCELLOR:—The master has obviously mistaken the object of the reference as to the title. He should have ascertained and reported what part of the premises belonged to each of the parties, and the quantity of their estate therein, whether for life or in fee, instead of reporting the chain of title which was not necessary any further than to show how the incumbrances affected the different shares. He has also made an evident mistake in relation to the amount of the incumbrances, but whether in favor of or against the infant complainants, I am unable to determine. The annuity to Mrs. Kellogg is for life, and yet the master has only reported the arrears up to the time of his report, without allowing any thing for the value of the annuity for

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Harwood

v.

Kirby.

the remainder *of her life. He has also made a mistake the other way, in estimating the legacies to the two grand-daughters of the testator as legacies absolute, or annuities in fee. They are entitled to the \$500, or to the interest thereon for life, at the election of the devisee. The master ought, therefore, to have ascertained the arrears now due, and computed the present value of an annuity of \$35 for the remainder of the life of each. If any decree could be made in the cause, the sale could not be ordered until the extent of these incumbrances was ascertained with more certainty.

The important question in this cause is, what decree can be made consistently with the equitable rights of all the parties. It is now the settled law that an incumbrancer upon an undivided share of the estate cannot be made a party to a suit for the partition of the whole property.[1] His right cannot be affected by a partition or sale of the estate. If it is divided, the incumbrance continues a lien on the share set off to the party whose undivided portion of the premises was before bound.[2] In the case of a sale, the purchaser takes the premises subject to the lien upon the undivided share; and has the same equity to throw the incumbrance on to the other lands, or other persons, as the party whose share is incumbered would have had if the sale had not taken place. Such is the effect of the decision in *Sebring v. Mercereau*, (Hopk. Rep. 501,) and that decision was afterwards unanimously affirmed in the court of *dernier* resort. In cases where there are contingent incumbrances, or contests as to the amount of the liens on any particular share, it follows of course that the other parties never can be fully indemnified for the loss they will sustain by a sale of their property in common with that which is in controversy. Although the court, for the purpose of the partition, may direct an account to be taken of the probable extent of such liens, the purchaser can never rely upon that

[1] 2 R. S. (4th ed.) 577, sec. 8, 10.

[2] 2 R. S. (4th ed.) 578, sec. 2.

account, as the incumbrancers will not be bound thereby; and he must take upon himself the risk of contesting the question as to the amount afterwards. The answer in this cause shows that there is sufficient personal property in the hands of the executors of Kellogg to discharge *all the legacies, and which was to be first applied for that purpose. If this be so, the amount of those liens cannot be deducted from the defendant's share of the purchase-money.

Ample provision is made for a case like the present in the Revised Statutes. After they go into operation, the court may decree a sale which will give to the purchaser a perfect title to the premises, discharged of all liens and incumbrances, and the half of the purchase-money belonging to the defendant, after deducting costs, will be brought into court, leaving the various incumbrancers to litigate their rights to that part of the purchase-money with him. I am therefore satisfied it is for the interest of all parties, but more particularly of these infant complainants, that no decree for sale should be made in this case previous to the first day of January next. The cause must therefore stand over until that time, when either party may apply for such decree for the sale of the premises as may be just, and as the court may then have the power to make.

1879.

Manny
v.
Phillips.

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MANNY, ADMINISTRATOR, &c. v. PHILLIPS.

Where a debtor conceals his ownership of property to prevent its seizure from executions against him, and one of his judgment creditors aids him in this fraud, this court will not interpose in favor of the debtor against such judgment creditor, but will leave the parties to their legal rights.

If executors or administrators commence a suit in Chancery in good faith, upon probable grounds of right, and to enforce a supposed claim of the testator or intestate, they will not be charged with costs.

But if they bring a suit in this court merely to aid a defence at law, they can-

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May 19th.

not, in case of failure, be excused from costs here, in a case in which costs would be given against them in the suit at law.

THE bill in this cause was filed to set aside a judgment entered upon a bond and warrant of attorney given by the intestate to the defendant. The whole equity of the bill was denied by the answer; but the complainant proceeded to take testimony, and the cause was heard on pleadings and proofs.

J. S. Van Rensselaer & J. J. Danford, for complainant.

M. T. Reynolds, for the defendant, cited 2 John. Ch. R. 274; 3 Brown's Ch. R. 475.

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*THE CHANCELLOR :—The answer of the defendant shows a good and valuable consideration for the bond and warrant on which the judgment was entered up, and there is nothing in the proof to discredit the answer. Probably the intestate had particular reasons for having the fact of his ownership of the horse concealed, to keep it from the reach of executions; and if the defendant had lent himself to such a fraud, it would not be a good reason for the interposition of this court. In such cases this court leaves the parties to their legal rights.

The only possible question in this case is as to the defendant's right to costs. In general, an executor or administrator who brings a suit in this court in good faith, on a probable ground of right, will not be charged with costs. The object of this suit was not to enforce any supposed claim of the intestate against the defendant. Its real object was a defence to the suit at law which was brought against the administrator on the judgment. If an executor or administrator sets up a defence at law which fails, he is chargeable with the costs; and I can see no reason why he should be in a better situation when he attempts to make such defence by the aid of this court. If this suit had been

commenced by the intestate, there could be no possible reason for excusing him from the payment of costs; and in a case like the present, the representative character of the complainant cannot protect him.

1829.

Sweet
v.
Green.

The bill must be dismissed with costs.

SWEET v. GREEN.

Where a grantor in a quit claim deed covenants to warrant the premises against all persons claiming by or under himself, and subsequent to such conveyance he acquires the legal title to the premises, the same will enure to the benefit of the grantee.[1]

And where the premises have been conveyed by the grantee to a *bona fide* purchaser without notice, the original grantor cannot set up against such purchaser fraud or mistake in the insertion of the covenant of warranty in the original deed of conveyance.

The purchaser of lands under a judgment obtains all the right of the defendant to the premises, and no equity can be set up against him on account of notice which did not affect the title to the land in the hands of the judgment debtor.

*IN October, 1795, Jonathan Green was in possession by his tenant of forty acres of land, in the manor of Rensselaerwick, which he claimed to have purchased from J. Odell; but the legal title was then supposed to be either in Odell or S. Van Rensselaer. Jonathan Green on the 31st of the same month, conveyed this land by way of mortgage to the complainant, and authorized him, in case of the non-payment of the mortgage money, to receive the deed from Odell or Van Rensselaer in his own name. In September, 1797, the parties to the mortgage made a new arrangement,

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[1] *Kellogg v. Wood*, 4 Paige, 578; *Jackson v. Hoffman*, 9 Cow. 271; *Jackson v. Malsdorf*, 11 John. 91; *Jackson v. Wright*, 14 id. 193; *Jackson v. Murry*, 12 id. 201; *Peltreau v. Jackson*, 11 Wen. 110; *Jackson v. Ireland*, 3 id. 99. A conveyance by a *feme covert*, with warranty, although acknowledged according to the statute, will not operate by way of estoppel as to pass to her grantee, her subsequently acquired interest of the property conveyed. *Leal v. Woodworth*, 3 Paige, 470. See also *Jackson v. Winslow*, 9 Cow. 31.

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by which it was agreed that Sweet should take the 40 acre lot, except about half an acre, which is the subject of controversy in this suit, and two other pieces of land, one of which was a lease lot and the other a possession lot merely, at the appraisal of men selected by them for that purpose, and pay to Joseph, the father of Jonathan Green, the balance of the purchase-money after deducting the amount due to Sweet on his mortgage; and Sweet also agreed to convey to Joseph Green the half acre lot in controversy in this suit. It was understood at the time that the legal title was not vested in Sweet or Green, and the former therefore insisted that he would only give to Joseph Green as good a title as he received from Jonathan by the conveyance of October, 1795. A quit claim deed was thereupon given from Sweet to Joseph Green for the half acre in fee; but a covenant was inserted therein, by which the grantor covenanted to warrant the premises against all persons claiming by or under himself, and the bill in this cause was filed to get rid of that covenant upon the allegation that it was inserted by fraud or mistake. In December, 1797, Joseph Green conveyed the half acre to his son Jonathan, and in March, 1798, the latter conveyed it to Wm. Gillet. In July, 1799, Gillet conveyed it to James Green, and in May, 1813, the latter conveyed it to David Crandall and Green Crandall with warranty. In February, 1815, John Green, the defendant in this suit, recovered a judgment against the Crandalls in the Supreme Court, under which he obtained a conveyance of the half acre from the sheriff in July, 1817. The complainant had a junior judgment against Crandall, under which he obtained possession of the premises *in controversy. On the 11th of June, 1816, the complainant obtained from Stephen Van Rensselaer a conveyance of the whole lot, under which he claims the half acre in question; but in consequence of the covenant in his quit claim deed, he supposes himself estopped from setting up that claim. The cause was heard on pleadings and proofs.

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A. Van Vechten and J. P. Cushman for the complainants:—The bill in this case was filed to strike out the covenant of warranty in the deed from the complainant to Joseph Green, upon the ground that the same was inserted either by fraud or mistake. The covenant cannot be effectual against the title recently acquired by the complainant from Stephen Van Rensselaer. The complainant was surprised by this covenant, when he made the purchase from Mr. Van Rensselaer. Lapse of time will not, unless very long, bar a claim to be relieved against fraud. (*Cook v. Clayworth*, 18 Ves. 16; *Nichol v. Trustees of Huntington*, 1 John. Ch. R. 166, 177.)

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v.
Green.

D. Buel, jun., and D. Gardner, for the defendants, contended that a mistake could not be corrected, if the correction would defeat the intention of the parties; (*Lyman v. United Ins. Co.*, 17 John. R. 377; *Maine and wife v. Administrator of Dickinson*, 2 Dessaus. R. 191;) that the defendant was a *bona fide* purchaser without notice; that the claim of the complainant was barred by lapse of time; and that in no case where a covenant is read could ignorance of its effect be set up as an excuse. (*Anderson v. Roberts*, 18 John. Rep. 531; *Fletcher v. Peck*, 6 Cranch, 133; *Sugden*, 661; 1 Mad. Ch. 206; *Jackson v. Henry*, 10 John. R. 185; *Starkie's Ev.* 4th p. 1018, 1019, 1020; *Jones v. Stat-ham*, 3 Atk. R. 389; *Executors of Getman v. Beardsley*, 2 John. Ch. R. 274; *King v. Baldwin*, id. 557; *Lyman v. United Ins. Co.*, id. 630; *Irnham v. Child*, 1 Brown's Ch. Cas. 93; *Shelburne v. Inchiquin*, id. 341; *Wendell v. Van Rensselaer*, 1 John. Ch. R. 324; *Storrs v. Barker*, 6 John. Ch. R. 166; 1 Ambler's Rep. 101; *Gregory v. Gregory*, Cooper's Ch. R. 201; *Bonny v. Ridgard*, 1 Cox's Cas. in Ch. 145; *Morse v. Royall*, 12 Ves. 373, 377; *Davoue v. Fanning*, 2 John. Ch. R. 252; *Underhill v. Van Cortland*, id. 362.)

*THE CHANCELLOR:—There are several substantial objections to the complainant's claim to amend the original

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Park
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Peck.

conveyance by striking out the covenant. At the time he obtained his conveyance of the legal title from S. Van Rensselaer, Crandall was in possession as a *bona fide* purchaser of the premises, by divers mesne conveyances from the complainant's grantee, and without any notice of the alleged fraud or mistake. The moment, therefore, that Van Rensselaer's deed was given, by the covenant of warranty in the conveyance of Sweet, Crandall became vested with a perfect title in the half acre, and subsequent notice to him or his assigns could not divest that title. Green, who obtained the property under the judgment against Crandall, obtained all the right which the latter had in the premises, and no equity can be set up against him on account of notice. (*Jackson v. McChesney*, 7 Cowen, 380.)

Independent of this legal objection, I am satisfied from the testimony that the effect of the covenant, under the circumstances, produces the exact state of things contemplated by the parties; and if it had not been inserted, the defendant would have been entitled in equity to a quit claim from the complainant of the title acquired under the conveyance from Van Rensselaer. And the weight of proof also is, that the covenant was knowingly and intentionally inserted for the purpose of vesting the title in the grantee, whenever a conveyance for the whole lot should be obtained from Van Rensselaer, the nominal owner.

The bill must be dismissed with costs.

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*PARK v. PECK AND OTHERS.

Where the purchaser of mortgaged premises had admitted the existence of the lien within twenty years, and promised to discharge the mortgage, it was held sufficient to rebut the presumption of payment arising from the lapse of time.

Such admissions of the purchaser are also legal evidence against all his judg-

ment creditors whose judgments have been recovered subsequent to such admissions.

1839.

Where a defendant in a bill of foreclosure knowingly sets up an unjust defence, and thereby subjects the complainant to extra costs and expense, he may be charged personally with the costs.

Park
v.
Peck.

THE bill in this case was filed to foreclose a mortgage given in 1803, which had been due more than twenty years. One of the defendants was the purchaser of the equity of redemption, and the others were the judgment creditors of such purchaser. They alleged, in their answers, that the mortgage was paid, and insisted upon the lapse of time as evidence of such payment. To rebut this presumption, the complainant gave in evidence the admissions of the administrator of the mortgagor, and also the admissions of the purchaser of the equity of redemption made by him subsequent to his purchase and prior to the judgments of the other defendants.

W. Silliman, for the complainant, contended that no presumption of payment could be raised against the mortgage from the lapse of time, it being less than 25 years since it was given; that a longer time was necessary to raise the presumption in the case of a mortgage than of a bond; and that if the lapse of time was sufficient to raise the presumption of payment, such presumption was rebutted by the circumstances of the case. (*Oswald v. Leigh*, 1 Term R. 271; *Hillary v. Waller*, 12 Ves. 264; *Fladong v. Winter*, 19 Ves. 196; *Boltz v. Bullman*, 1 Yeates' Rep. 584; *Executors of Brewton v. Executors of Cannon*, 1 Bay's R. 488; *Cottle v. Payne*, 3 Day's R. 289; *Quince v. Ross*, Taylor's R. 155; *Jackson ex dem. The People v. Pierce*, 10 John. R. 414; *Roseboom v. Billington*, 17 John. R. 182; *Jackson v. Delancey*, *11 John. R. 865; *Jackson v. Delancey and another*, 13 John. 587; *Colsell and others v. Budd and others*, 1 Campb. 27; Phil. Ev. 114; *Tophis v. Baker*, 2 Cox's Ch. Cas. 122.) If the complainant fails on account of the presumption of payment from the lapse of time, he will not be

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1829. liable to costs. (*Demarest v. Wynkoope*, 3 John. Ch. 147.)
 Park But the defendants having, by an unjust defence, put the
 v.
 Peck. complainant to expense and trouble, ought to be decreed to
 pay costs. (2 Mad. 427, 423.)

C. F. Grim, for the defendants, cited *Oswald v. Leigh*, 1 D. & E. 271; *Giles v. Barremore*, 5 John. Ch. 552; *Hillary v. Waller*, 12 Ves. 266; *Trash v. White*, 3 Brown's C. C. 289; *Collins v. Torry*, 7 John. R. 283; *Whiting v. White*, 2 Cox's Ch. Cas. 298.

THE CHANCELLOR:—The evidence is sufficient to rebut the presumption of payment arising from the lapse of time. The mortgage was given in 1803, and payable the succeeding year. The mortgagor was a brother of the complainant, and continued poor until his death, in 1810 or 1811. In the latter year his administrator acknowledged the mortgage was unsatisfied, and sold the premises under the surrogate's order subject to the lien thereof. The evidence is sufficient also to show that Peck, the purchaser, frequently recognized it as an existing incumbrance and promised to settle it.

These admissions and promises were made long prior to the judgment of Hart and Card against Peck, and therefore are evidence against them as well as himself. There must be the ordinary decree for a reference to ascertain what is due on the mortgage, and for a sale on the coming in of the master's report.

The complainant asks costs against the judgment creditors who have put in their answers, and put him to the proof of the existence of the lien. If a defendant, against his better knowledge, sets up an unjust defence and puts the complainant to extra costs when the premises are insufficient to pay the whole amount, such extra costs ought to be charged on the defendant personally. But this is not a case of that description. These judgment creditors had no knowledge *that the mortgage was an existing incum-

brance; and from the complainant's neglect to enforce it for more than twenty years after the amount was due, they had a right to presume it paid, and to put him to prove the contrary. He has no personal claim against them for the costs in such a case.

1829.
Stephens
v.
Van Buren.

STEPHENS AND OTHERS v. VAN BUREN AND WYCKOFF,
EXECUTORS

Where executors or administrators, without any sufficient excuse, refuse to pay over to the general guardian funds belonging to infants, they may be personally charged with costs.

If executors retain money in their hands, belonging to infants for several years without any good reason for so doing, they will be charged with the interest which they might have received thereon.

The court will protect the rights of infants where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf.

THIS was a suit brought in the name of infants, by their May 25th. guardian, to recover the amount belonging to them in the hands of the executors of their grand-father. The facts upon which the decree was founded appear in the opinion of the court.

THE CHANCELLOR:—This is a bill filed by infants to recover their share of the estate of their grand-father which was bequeathed to them after the death of their mother. She died about the first of December, 1825; at which time the share of the estate belonging to the complainants was \$12,724 83. Their guardian applied for the payment of what was due; but the defendants declined paying it over for some reason which does not appear. The defendants and the guardian have submitted the case for the consideration and decision of this court. As there appears to be nothing in dispute between them, I can see no reason

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Stephens

v.

Van Buren.

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for charging these infants with the expense of this suit; and as the executors refused to pay without any excuse for such refusal, I should probably have given the guardian his costs against them if he had asked it. There is one thing, however, manifestly wrong. The executors *have had the money three or four years in their hands, and without any excuse for retaining it, and yet the guardian does not, in his draft of the decree, even ask them to pay the interest. I cannot suffer him thus to deprive the infants of what appears a fair and equitable claim against the defendants. There must be a reference to a master to ascertain what is due to each of the infants from the defendants; and the master must charge the defendants with the interest which they have received or might have received on such amount, with reasonable diligence, since the death of the mother. The master must also ascertain whether the guardian has given sufficient security to the infants for the faithful execution of his trust; and in judging of such security, he must see that there are two responsible persons, each of whom is worth over and above all debts double the amount of the personal estate of the infants, including interest thereon during their minority, and of the whole amount of the rents and profits of their real estate during that period. The penalty of the bond should be to that extent. On the coming in and confirmation of the report, if it appears the security is sufficient, the defendants must pay the amount reported due to the guardian; and if insufficient, they must pay it into court, to be invested for their benefit by the assistant register until security is given to the satisfaction of the court.

1829.

FLOYD AND FLOYD v. BARKER AND FERRIS,
EXECUTORS, &c.

Floyd
v.
Barker.

Where there is a general residuary clause in a will, if a specific legacy is revoked, or becomes lapsed, it falls into the residue, to be disposed of under the general clause; but if the residue is given to several persons in common, and one of them dies, or his legacy is revoked, his share will go to the next of kin, and not to the other residuary legatees.

THE complainants are legatees under the will of Gloriana Franklin, who died in 1804. By her will, among other things, she bequeathed certain articles of property and certain sums of money, to be paid out of her estate, to Sophia Dayton; and she directed her executors, if upon settling her estate they found they had money in their hands more than *sufficient to pay off the legacies given by the will, or if, from any unfavorable circumstances, they should not have sufficient to pay said legacies, that then they should pay to her legatees all such moneys which they should have in their hands, be the same more or less, in proportion to the sums therein given to the legatees, except the sums of money given to her slaves, which were in no case to be diminished or augmented. She afterwards made a codicil, by which she revoked all the gifts and legacies given by her will to Sophia Dayton, and bequeathed the same to certain persons therein named, among whom were the complainants. The bequest to them was as follows: "Also of such money, I give and bequeath to Alfred Floyd, son of John Floyd, and to his heirs and assigns forever, the sum of \$250 out of the said money mentioned in my will to be paid to the said Sophia. Also, I give and bequeath to Jesse Floyd, son of the said John Floyd, being in Suffolk county, the sum of \$250, and his heirs and assigns." She then continued: "And if the money so given to my said kinswoman Sophia as aforesaid shall be more than sufficient to pay the said legacies, or shall fall short of paying, in such case I will and order that the legacies

May 25th.

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1829. be paid accordingly." Thomas Thomas, one of the legatees named in the will, and also in the codicil, died before the testatrix. The defendants who were named as executors in the will took upon themselves the execution of the trust. There was money in their hands more than sufficient to pay off all the pecuniary legacies and the complainants insisted upon the right of having their legacies increased proportionably with the other legatees out of such surplus, and claimed the lapsed share of Thomas Thomas as a part of such surplus. The executors doubting their right, refused to increase the legacies of the complainants, and asked the direction of the court.

Floyd
v.
Barker.

W. Silliman, for complainants.

R. Bogardus, for defendants.

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*THE CHANCELLOR:—The bill in this cause was filed to obtain the construction of the will of Gloriana Franklin and the codicil annexed, so far as relates to certain legacies given to the complainants in the codicil.

Under the second clause of the will Mrs. Dayton was entitled to half the proceeds of two houses and lots in the city of New York; but by the codicil the legacy to Isaac Sniffin is to be paid out of the same. This, of course, constitutes a part of the fund out of which the legacies to the complainants and others in the codicil are to be paid. It was also undoubtedly the intention of the testatrix that the goods, &c., bequeathed to Mrs. Dayton for life, and the residue to the children, should also constitute a part of that fund. Although the word money is used, yet, as she had directed those goods in the end to be turned into money, she must have intended to dispose of the proceeds thereof in the codicil. The legacy given in the fifth clause of the will of course constitutes a part of the fund, which last fund is to be increased or diminished under the eleventh clause in proportion to the pecuniary legacies therein contained, except those to the blacks. But in ascertaining the

amount of that fund, the lapsed legacy to Thomas Thomas is not to be taken to increase the same. The amount which would have belonged to him if he had lived does not belong to the legatees in the will, but to the next of kin. And the same rule must be applied to the division of the share originally given to Mrs. Dayton when it comes to be divided among the legatees under the codicil: that is, the share of the complainants to be ascertained and computed in the same manner that it would have been if Thomas Thomas had survived the testatrix; and the whole that would in such case have belonged to him now belongs to the next of kin. Where there is a general residuary clause in a will, if a specific legacy is revoked or becomes lapsed, it falls into the residue to be disposed of under the general clause. But if the residue is given to several in common, and one of them dies, or the bequest is revoked as to one, his share goes to the next of kin. (*Cheslyn v. Cresswell*, 6 Brown's P. C. 1; *Bagwell v. Dey*, 1 Peere Wms. R. 700; *Hunt v. Berkeley*, Mosel. Rep. 48; *Skrymsker v. *Northcote*, Wils. Ch. R. 248.) The case of *Ackroyd v. Smithson*, (1 Brown's Ch. Rep. 503,) is very similar to the present. In that case the executors were directed to sell the real and personal estate and out of the proceeds to pay the debts and legacies; and if there was a surplus, to pay it to his legatees in proportion to their several and respective legacies. Two of the legatees died in the lifetime of the testator; and on a bill filed by the next of kin, Lord Thurlow decided that the shares of the two who died were lapsed and belonged to the next of kin, so far as they were constituted of personal estate; and that so far as those shares were made up of the proceeds of the real estate they belonged to the heir at law.

A decree must be entered declaring the rights of the complainants under the will and codicil as above stated, and if necessary an account must be taken to ascertain the amount due, and the costs of the executors are to be paid out of the fund which belongs to the next of kin in conse-

1829.

Floyd
v.
Barker.

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1228. Sears
v.
Myer. quence of the lapsed legacies. If the complainants had brought all the legatees and next of kin before the court, so that their rights could have been ascertained and settled in this suit, the whole costs would have been allowed out of the general residue; but not having done so, they must bear their own costs, as the other parties interested may be compelled to sustain a similar expense to obtain an account and satisfaction of what is due to them.

SEARS AND WIFE v. HYER AND OTHERS.

An adult husband may file a bill in Chancery for the partition of his wife's estate, although she is an infant.

He has a valid and subsisting interest of his own in the premises, and may therefore join with her in the suit.

Where lands of the wife who is an infant are sold under a decree in partition, the husband is not entitled to the proceeds, but the court will secure the fund for her use until she becomes of age and consents to his receiving the same.

An omission of the solicitor or counsel to sign an answer will not affect the validity of a decree.

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*If a mortgage is given on an undivided share of the estate pending a suit for partition, the lien of the mortgagee will be divested by a sale of the premises under the decree, and the purchaser will take the estate discharged from the incumbrance.

THE bill in this cause was filed to obtain partition of certain real estate in the city of New York, an undivided share of which belonged to W. S. Sears in right of his wife, who is an infant and the residue belonged to the defendants. The whole premises were subject to a mortgage executed by G. Hyer, from whom all the parties derived their title; and since the commencement of this suit Thomas R. Hyer, one of the defendants, mortgaged his share of the property to H. Rogers, who had notice of the pendency of the suit at the time he took such mortgage. The usual decree for

the sale of the premises was made, and the master was directed out of the purchase-money to pay off the mortgage on the whole premises, and the costs of the respective parties, and to deposit with the assistant register one-third of the residue subject to the further order of the court to secure the widow's dower. He was also directed to pay to the complainants and two of the defendants, each one-fifth of the sum remaining, and to deposit the shares of T. R. Hyer and one of the other defendants with the assistant register, subject to the further order of the court.

1832.

Stann
v.
Hyer.

George Lorrillard became a purchaser at the sale, and entertaining doubts as to the title, he obtained a reference to a master to take proof of the facts, and to ascertain and report whether a good and valid title could be made to the purchaser at such sale. The objections made by the petitioner were: 1. That the wife being an infant, the proceedings were unauthorized; 2. That the purchaser had a right to have the mortgage on the whole premises paid off before he took his title; 3. That he had a right to a release of the mortgage to H. Rogers; 4. That the answer of one of the defendants was not signed by either solicitor or counsel. The master decided in favor of the second and third objections, and against the others.

J. R. Hedley, for the petitioner, contended that infants could not bring suits in partition, the power to bring such suits being confined by the statute to adults, (*Jackson v. Woolsey*, 11 John. R. 455;) that the mortgage upon the whole premises ought to be paid off before the petitioner was compelled to take the title, as otherwise the premises would continue subject to the lien of the mortgage; that mortgagees and judgment creditors could not be made parties to a suit in partition, and were not bound by the judgment in such suit. (*Wotton & Wife v. Copeland and others*, 7 John. Ch. R. 140.)

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J. L. Mason for the defendants:—In Chancery an infant

1829.

Sears
v.
Hyer.

may bring a suit in partition, and will be bound by the proceedings therein. (*Lord Brooke v. Lord and Lady Hertford*, 2 P. Wms. 518; *Gregory v. Molesworth*, 3 Atk. R. 626.) Even under the statute, if one of the plaintiffs is an adult, the proceedings will be sustained, although all the rest are infants. (*Jackson v. Woolsey*, 11 John. R. 455.) Halsey Rogers having taken his mortgage after the commencement and with notice of the suit, his title was divested by the sale. It was not necessary to file a notice of the foreclosure in the clerk's office. This is only required in cases where the filing of the bill would be constructive notice to a purchaser of real estate; cases to which the doctrine of *lis pendens* applies; and where such an interest in the subject matter is acquired pending the suit, which, if it had been acquired before the commencement of the suit, would have created a new party in interest, whom it would have been necessary to have made a party to the suit. The object of the rule of *lis pendens* is to prevent the purchase of litigated titles, and to enable the complainant to proceed in his suit without the delay of making new parties. (*Bishop of Winchester v. Paine*, 11 Ves. 194, 9; *Murray v. Ballou*, 1 John. Ch. R. 566; *Murray v. Lylburn*, 2 John. Ch. R. 441; *Hiern v. Mill*, 18 Ves. 120.) The rule does not apply to a case where the interest is such as will not make the person acquiring it a necessary party to the suit. (*Wooten and wife v. Copeland*, 7 John. Ch. R. 140; *Sebring v. Mercereau*, 1 Hopk. R. 501.) A mortgagee of an undivided share of real estate has no greater rights than the tenant in common against whom he holds his mortgage; and in case of a partition, his lien is *confined to the part allotted to such tenant in common. (*Jackson v. Pierce*, 10 John. R. 414.) If the mortgaged premises should be sold, the mortgagee will be remitted to the proceeds instead of the land.

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W. S. Sears, for the complainants.

A. Burr, for the assignee of H. Rogers.

THE CHANCELLOR:—There can be no doubt of the right of an adult husband to file a bill in this court for the partition of his wife's estate, although she is an infant. He has a valid and subsisting interest of his own in the premises, and may therefore join with her in the bill. In the case of *Lord Brooke v. Lord and Lady Hertford*, (2 Peere Wms. 508,) the sole complainant was an infant, and yet partition was decreed. The only error in the decree in this cause was in directing the purchase-money of the wife's share of the property to be paid to her husband before she was of age to consent thereto. It must be corrected so far as to have that share paid into court to be invested for her use, unless the husband gives the assistant register a bond, with two sufficient sureties, in double the amount, to account to her as the court shall direct, when she becomes of age.

1829.

Sears
v.
Hyer.

The neglect to have one of the answers signed by counsel, &c., was a mere error in practice which cannot affect the validity of the decree.

The decree makes provisions for the payment by the master of the mortgage on the whole premises, out of the purchase-money when received. The petitioner had no right to suppose the money would be misapplied by the master. He purchased with knowledge of this fact on the face of the decree; and if he had any doubts as to the application of the fund, he might have gone with the master to the mortgagee, and have paid the money himself to that extent, and the master would have deducted it from the amount. This, therefore, can be no reason for his refusal to complete the purchase.

The only objection in which there is any appearance of validity is that which relates to the mortgage to H. Rogers. *By the decision of the Court of Errors in *Sebering v. Mersereau*, (9 Cowen, 344,) it is settled that a person holding an incumbrance on an undivided share of the premises need not be a party, and that his interest is not affected by the sale; but in that case it was also holden that the pur-

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1829.
Kettletas
v.
Gardner.

chaser takes the property subject to the incumbrance. In partition cases the rights of the parties should be ascertained as far as practicable before the decree, and the premises should be sold at the risk of the purchaser. That probably was not the case on this sale; and if there were any doubts as to the right, I might be induced to order a new sale. But as the fact that H. Rogers held a mortgage on one of the shares appeared on the face of the decree, it is to be presumed the purchaser was aware of the fact that he had taken that mortgage *pendente lite*, and that his title would be divested by the sale; or that the petitioner purchased subject to that incumbrance, and paid a price accordingly.

It now distinctly appears that this mortgage was taken *pendente lite*, with full knowledge that a suit for partition of the premises had been commenced, and the mortgagee has no different rights from those of the mortgagor. The title of both is completely divested by the sale, and the petitioner will have a perfect title to the whole premises. But for his further protection against useless litigation I shall direct that no part of the purchase-money belonging to the share of Thomas R. Hyer, or his mortgagee, be paid to either of them, or their assigns, until the purchasers under the master's sale had a valid release from all claims upon the mortgaged premises by virtue of the mortgage to H. Rogers. And none of the parties are to have costs as against each other, upon the petition of Lorrillard and the subsequent proceedings thereon.

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*KETTLITAS AND WIFE v. GARDNER AND WIFE.—J.
GARDNER, AN INFANT v. THE SAME.

Fixed habits of intemperance constitute a sufficient reason for the removal of a guardian.

And it is improper that the wife of a husband addicted to such habits should be the guardian, she being subject to his control.

An adult husband is entitled to the guardianship of the person of his wife during her minority.

1829.

Kettletas
v.
Gardner.

IN January, 1818, James Gardner and Charlotte his wife June 1st. were appointed by the surrogate of New York guardians of the persons and estates of Malvina Gardner and John Gardner, two infants. Malvina is now about nineteen years of age and is married to Eugene Kettletas, and John is about seventeen years of age. A petition was presented in each case setting forth that James Gardner had become insane and was in the lunatic asylum, and praying that he and his wife might be removed from the guardianship. A reference was made to a master to ascertain the facts. The master reported that at the time the report was made, James Gardner was of sound mind, although his bodily health was much impaired. He also reported that in consequence of Gardner's fixed habits of intemperance, which brought on frequent attacks of insanity, and of there being no satisfactory evidence of his reformation, he was of opinion that he ought not to be continued in the guardianship.

R. Bogardus, for the petitioners.

A. Burr, for the guardian.

THE CHANCELLOR :—The opinion of the master, that the guardian who has become so intemperate as to be occasionally insane, is unfit for a guardian without evidence of a thorough reformation in his habits, is perfectly correct. At the time the petitions were presented, the guardian was confined as a lunatic, which derangement was produced by his vicious habits. He was himself a proper subject of guardianship, *and continues so, unless he has abandoned those habits. The court has no assurance that there is in him any permanent reformation. He has therefore forfeited the guardianship, and must be removed. If it is improper

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1829. *In the Matter of Van Cott.* for him to have the management of the estate, it is equally improper for his wife, who is subject to his control. The guardianship of the person of one of the infants belongs to the husband, and Mrs. Gardner is not a proper guardian of the person of the other. The whole guardianship must therefore be changed. Philip D. Kettletas is to be appointed guardian of the person of John Gardner, on his giving a bond, with sufficient sureties to be approved of by Master Bolton. But he is not to pay any thing for the support or maintenance of the infant John Gardner, unless he consents to prosecute his studies, or to go into some regular business, under the direction of his guardian, and then nothing more is to be advanced for his support than is absolutely necessary. There must be a reference to a master to state the account of the former guardians; and all further directions are to be reserved until the coming in and confirmation of that report.

IN THE MATTER OF VAN COTT, AN HABITUAL DRUNKARD.

Where leave was granted to traverse an inquisition against an habitual drunkard, and the finding of the inquest was confirmed, the costs to be charged on the estate of the drunkard cannot exceed twenty-five dollars; out of which sum the expenses of the committee are first to be paid.

If an issue is awarded for the benefit of a third person, and it is found against him, no costs will be allowed to the solicitor who prosecutes the traverse.

July 4th.

A PETITION for leave to traverse the inquisition in this case was presented, in which *J. B. Scoles* appeared as solicitor. An issue was directed, and the finding by the inquest was confirmed. The solicitor applied for an order that the committee pay his costs and expenses, as between solicitor and client, out of the estate. He stated that he had only received about \$20 or \$25. By the affidavits on the part

of the committee, it appeared that deeds from Van Cott to the solicitor *and to S. S. Johnson were overreached by the finding of the jury, and that the issue was in fact for their benefit.

1829.
Mills
v.
Pittman.

F. A. Tallmadge, for Scoles.

S. F. Clarkson, for the committee.

THE CHANCELLOR :—The statute under which the proceedings in this case were instituted, limits the expense to be charged on the estate at twenty-five dollars in case of a traverse. It necessarily follows that in no case of an unsuccessful traverse can the solicitor of the traverser have any allowance out of the estate. The committee's expenses must be first paid, and they will absorb the whole amount allowed by law. But in this case there can be no reason for paying the costs of Scoles out of the estate in the hands of the committee, even if there was no restriction in the statute. Van Cott had conveyed all his real estate to Scoles and Johnson, and this traverse was substantially for their benefit. The allowance of costs is discretionary, and depends upon the character of the application and the conduct of the party. In *Folger's case*, (4 John. Ch. Rep. 169,) the grantee of a lunatic for whose benefit the issue was awarded, was directed to pay the costs to which the committee had been subjected thereby.

The application must be refused, with costs to be paid by Scoles to the solicitor of the committee.

MILLS AND MENTON v. PITTMAN.

If the complainant wishes to prove any fact on the hearing not admitted by the answer, he must file a replication to the answer.

1829.

Mills
v.
Pittman.

Where the fact to be proved is a matter of record, the complainant after filing his replication may give notice of his intention to produce the record or an exemplification thereof at the hearing, and then obtain his orders to produce witnesses and close the proofs in the usual manner.

Where the right to a debt due from a third person is in litigation, it cannot with safety be paid to either party after notice; but the debtor will be permitted, pending the litigation, to pay it into court to the credit of the cause.

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*If it is necessary to enforce the collection of the debt, a receiver must be appointed.

June 4th.

THIS was a petition presented by the complainants, stating that the answer of the defendant had been put in, and that they were anxious to bring the cause to a hearing upon bill and answer, but it was necessary for them to prove the issuing and return of an execution of which the defendant in his answer denied all knowledge; and they asked leave to prove it at the hearing without filing a replication. They also asked that the defendant should be compelled to collect a debt due him from a third person, and pay the amount into court, or that they might do it in his name.

R. Sedgwick, for the motion.

W. S. Sears, for the defendant.

THE CHANCELLOR:—If the complainants wish to prove any fact in the bill not admitted in the answer, they should file a replication, and give the defendant an opportunity to be heard on the question of the existence of the fact. If it is a mere exemplification of a record which proves itself, it may be sufficient to give notice to the defendant that it is to be used on the hearing, which will enable him to examine witnesses to explain or rebut the effect thereof, if it can be explained. The debtor whose debt will become due pending the litigation cannot safely pay it to either of the parties after notice. If he is willing to pay the debt, he is at liberty to pay it into court to the credit of the cause, and in that case the court will order his note to be given up.

But if it is necessary to enforce the collection before a final hearing, a receiver must be appointed.

1829.

The complainants are not entitled to the specific relief prayed for in the petition, and I have not sufficient before me to determine whether it is a proper case for a receiver. The petition must therefore be dismissed with costs.

Durell
v.
Haley.

*DURELL AND OTHERS v. HALEY AND TURNER.

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If a purchaser who is insolvent, concealing his insolvency from the vendor, obtains goods from him without intending to pay for them, it is a fraud upon the vendor, and the property in the goods will not be changed.

But if the goods have been resold by the fraudulent vendee to a *bona fide* purchaser who has actually paid for the same without notice of the fraud, such purchaser will be protected.

Where an insolvent confessed a judgment to his friend, on which an execution immediately issued, and then purchased goods for the purpose of subjecting them to the execution, it was held to be a fraud upon the vendor, and the judgment creditor was not permitted to retain the goods, which had been purchased in by him upon his execution.

THE parties to this suit all reside in the city of New York. On the 7th of August, 1826, the defendant Haley finding himself insolvent, gave to Turner a judgment bond to secure a real or pretended debt of \$3,000, on which a judgment was immediately entered and an execution issued to the sheriff of New York. Turner took possession of Haley's store and the goods on hand. On the 8th and 9th of August, Haley purchased other goods of the complainants and took them to his store; upon which the sheriff then levied the execution in favor of Turner, who purchased in the goods for himself at a sale under the execution. The complainants thereupon filed their bill to set aside the sale of the goods, and to have them returned, upon the ground that they had been fraudulently obtained.

1829.

Durell
v.
Haley.

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D. Selden, for the complainants:—The purchase of the goods in question by the defendant Haley from the complainants, without notice to them of the judgment and execution against him, was fraudulent and void, and did not vest the property in the purchaser. It has been held that where a debtor purchases goods with intent to subject them to an execution against him, the sale will be deemed fraudulent. (*Van Cleef v. Fleet*, 15 John. 147.) So where a person buys goods with the intention of making them the property of another, without disclosing his intention to the seller, such sale would be fraud upon the seller. There was evidently in *this case a fraudulent combination between the two defendants to cheat the complainants. It is a settled rule that a sale is void where the purchaser, is insolvent, if the fact be not at the time communicated to the seller. *Cross v. Peters*, 1 Greenleaf, 376; 2 Kent's Com. 404.)

S. B. H. Judah, for the defendants, contended that there was no collusion or combination shown between the two defendants; that Turner was a *bona fide* creditor of Haley, and having the legal right, was entitled to a priority in payment.

THE CHANCELLOR:—This is a clear and palpable case of fraud. It is not very material to inquire whether the judgment bond was given for a real debt or one which was entirely fictitious. If the cause turned on that question I should be inclined to believe the whole transaction was fraudulent from the beginning. But the purchase of the goods was a gross fraud, so that the title to them was not changed. Haley knew he was insolvent and unable to pay for these goods, and unquestionably purchased them with a view to subject them to the execution which had been previously issued; and to induce the complainants to sell, he paid up a small sum due upon his antecedent purchases. If a purchaser who is insolvent conceals that fact from the

vendor, and thus obtains goods without intending to pay for them, it is a fraud, and the property is not changed in the hands of the vendee:[1] but the goods would be protected in the hands of a *bona fide* purchaser from the fraudulent vendee, if he had purchased and paid for the same without notice of the fraud.[2] In *Sinclair v. Stevenson*, (10 Moore's R. 53,) Best, Ch. J., says if a person orders goods to be sent to him at night, and early the next morning commits an act of bankruptcy, he must be taken to have obtained possession of them by artifice or fraud. The case of *Van Cleaf v. Fleet*, (15 John. Rep. 147,) is directly in point to show, that the property was not liable to the execution of Turner. I have no doubt he was well acquainted with the fraud; but certainly he cannot be considered a *bona fide* purchaser, as he had enough at least to put him on *inquiry. There must be a decree that the goods be restored to the complainants, and that the defendants pay the costs of this suit. I shall also direct that the copies of the pleadings and proofs be delivered to the District Attorney of New York, that he may lay the case before the proper tribunal, to inquire whether the defendant Haley is not liable to be punished for obtaining these goods by false pretences.

1829

Squire
v.
Harder.

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SQUIRE AND WIFE v. HARDER AND OTHERS.

No resulting trust can be raised in favor of a grantor in opposition to the express terms of his conveyance.

Where the grantor conveys in fee with warranty, he is estopped from alleging that he had an interest in the purchase-money which created a resulting trust in his favor.[3]

[1] *Cary v. Hotelling*, Hill, (N. Y.,) 311; *Lloyd v. Brewster*, 4 Paige, 537; *Root v. French*, 13 Wen. 570; *Ash v. Putnam*, 1 Hill, (N. Y.,) 302; *Whitney v. Allaire*, 4 Denio, 554; *Olmstead v. Hotelling*, 1 Hill, (N. Y.,) 317.

[2] *Ash v. Putnam*, 1 Hill, (N. Y.,) 302; *Root v. French*, 13 Wen. 570.

[3] See *Sweet v. Green*, ante, 473; and authorities cited in note.

1829. This court will not decree a specific performance of an agreement made by a husband in relation to the real estate of his wife, to which she was not a party.
- Squire
v.
Harder. He can make no agreement which will affect her rights, without her consent.

July 8th.

THIS was a bill for the partition of a certain mill property in the county of Columbia, which formerly belonged to George Harder deceased. The complainant, Rebecca Squires, was one of Harder's children; and his widow and other children were the defendants. The complainants alleged that Harder died seized of the mill property, and the undivided half of a farm; that one-half of the mill property was sold by his administratrix under an order of the surrogate, and was purchased by Oliver Squire one of the complainants; that the undivided half of the farm was sold by the widow and the heirs; and that she received one-third of the purchase-money, and agreed to lay it out in land for her use during life, and that after her death it should go to the heirs; that she afterwards purchased from Squire his undivided half of the mill property. The heirs claim the sixth part of one half, subject to the widow's right of dower for life, and the sixth part of the other half subject to her life estate therein. The defendants admitted the descent of the property as charged in the bill, and the sale and resale of one-half of the mill property. They *also admitted the sale of the half of the farm, and that the widow received one-third of the purchase-money; but they denied there was any agreement that she should lay it out in lands, for the benefit of the heirs after her death. On the contrary they alleged, that it was the understanding and agreement of the parties that she should keep that one-third for her own use; and that about \$400 of the purchase-money of the mill property was raised by other means. They also alleged that Harder died seized of 1,375 acres of wild land, in which the widow was entitled to dower; and that it was agreed by all the parties that she should release her right of dower in those lands, and in consideration thereof that she should have the use of the whole of their half of the

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mill during life ; that in pursuance of that agreement, they made partition of the wild land among themselves, and she took possession of the whole of the mill property ; and all the defendants prayed a specific performance of that agreement. The cause was heard upon pleadings and proofs.

1829.
Squire
v.
Harder.

A. L. Jordan for the complainants.

C. Bushnell for the defendants.

THE CHANCELLOR:—The allegation in the bill that Mrs. Harder agreed to lay out the money received for the farm in other real estate, for the benefit of the heirs after her death, is absolutely denied in the answer, and is not supported by proof. There can, therefore, be no doubt that the widow is absolutely entitled to one-half of the mill property in fee. The other ground assumed by the complainant's counsel, that she purchased it with the moneys received for the farm, in which she had only a life interest, and that there was a resulting trust in their favor on the purchase, is wholly untenable. No resulting trust can be raised in opposition to the express terms of the conveyance, and in favor of the grantor. In this case the complainants have given an absolute conveyance of the inheritance, with warranty. They are, therefore, estopped from alleging that a part of the consideration was received in their own money, and that she only took a life estate as to the one-sixth. If they did not *voluntarily relinquish their claim on that money, their claim was personal on her ; but they have no legal or equitable interest in the premises conveyed.

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From the testimony taken in the cause, I am induced to believe there was a verbal understanding, that she should have the use of the other half of the mill property for life, as an equivalent for her dower in the wild lands. Whether that dower right was or was not of nearly the same value cannot be material in the view I have taken of this question. There was no valid agreement which can now

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be enforced against the complainants, inasmuch as they set up the statute of frauds. There has been no part performance of that agreement to take the case out of the statute. The partition of the wild land among the heirs did not affect her interest in the least. They had the right, and probably would have done the same thing, if no agreement as to the dower had been made. Neither does it appear from this testimony that she took possession or has made any permanent repairs on the mill property under that agreement. She was already in possession as the absolute owner of one-half, and as tenant in dower of one-third of the residue. I do not understand that any change took place at the time of that agreement. Besides, there is another insuperable objection to a specific performance of that agreement, even if it had been reduced to writing. The right in the mill property belonged to the wife, and the husband could not make any agreement which would destroy her right, without her consent. The other heirs having in their answer set up this parol agreement and joined in a prayer for a specific performance thereof, it must be so decreed as against them.

There must, therefore, be a decree for a partition of the premises among the parties accordingly; but as the parol agreement has probably prevented the widow from asserting her right to dower in the wild land which fell to the share of the complainants, the partition must be without any account against her for the rents and profits of the mill property which belonged to Squires, in the mean time; and the rights of the respective parties are declared as follows: The complainants, in right of the wife, are entitled to one-twelfth part of *the premises, subject to the life estate of the widow in one-third of that twelfth; each of the other heirs is entitled to one-twelfth, subject to the life estate of the widow in the whole of that twelfth; and the widow is entitled to six-twelfths in fee, and to a life estate in five-twelfths, and one-third of one-twelfth of the residue.

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As it is very certain from the testimony that the premises cannot be divided, the decree must direct a reference to a master in the county of Columbia to ascertain and report whether the premises are so circumstanced that partition thereof as aforesaid cannot be made without great injury to the owners thereof; and that on the coming in and confirmation of that report, if it shall appear that partition cannot be made, the premises be sold by a master on the usual notice; and that he give a deed thereof to the purchaser, and pay to the solicitors of the respective parties their taxable costs; that they pay one-half of the residue of the purchase-money to the widow, and two-thirds of one-twelfth to the complainants; and if the parties cannot agree to a division of any share or shares of the residue, in which the widow is entitled to a life interest, that he bring the same into court and deposit it with the register, to be invested in such manner that the widow may receive the income thereof for life, and that after her death it be paid to the parties entitled thereto, according to their right as above declared.

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IN THE MATTER OF ARNHOUT.

On the execution of a commission in the nature of a writ *de lunatico inquiring*, it is improper for the sheriff who summoned the jury to be in the room, or to converse on the subject with the jury while they are deliberating on their verdict.

When the sheriff had improperly interfered with the deliberations of the jury, their inquisition was set aside and a new commission was issued directed to the coroners.

Duty of commissioners on executing commission of lunacy, and instructions to be given to the jury.

*Where the relatives of a habitual drunkard prosecute a commission against him in good faith, they will not be charged with costs, although the prosecution should be unsuccessful.

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UPON the application of some of the relatives of Jacob July 8th. Arnhout, a commission in the nature of a writ *de lunatico*

1830. *inquirendo* was issued, to inquire whether he was, by reason of habitual drunkenness, incapable of managing his own affairs. The jury summoned in the first instance could not agree in finding an inquisition in favor of such allegation, and after remaining together some time were discharged. A new commission was thereupon issued, upon which an inquisition was found against Arnhout. He now applied to set aside this inquisition for irregularity and for alleged partiality on the part of the officer who summoned the jury.

J. V. N. Yates for Arnhout.

J. Lansing for the petitioner.

THE CHANCELLOR:—Without going into a detail of the several affidavits read on both sides in this case; and without expressing any opinion on the question whether the officer summoning the jury has acted partially, or has only mistaken his duty, I am satisfied there has been such irregularities in this case that the cause of public justice and the protection of the rights of the party against whom these proceedings have been had, require that this inquisition should be set aside. It was improper for the officer to be in the room with the jury, or to converse with them at all in relation to the matter which they had under consideration. The extent of his duty was, if directed so to do by the commissioners, to guard the passage to the room where the jury were deliberating, and prevent them from being intruded upon by others. He was not the officer to take the inquisition, but was merely to obey the directions of the commissioners in summoning the jury.

It was improper after what had transpired as to the manner of proceeding on the first commission, and after the intimation given by the commissioners, for him to go into the room or listen to the deliberations of the jury. The inquisition in this *case, and the commission must be set

aside, and a new commission issued. And to relieve the sheriff from all further censure, and remove all ground of complaint hereafter, it must direct that the warrant of the commissioners to summon a jury be directed to the coroners.

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To prevent any misapprehension of the duties of any one on the execution of this commission, it is proper to state that after the testimony is closed the commissioners should submit the question to the jury in the form of a charge, stating the law applicable to the case, and recapitulating the facts if necessary, but without arguments of counsel on either side. And the jury are to be instructed if twelve or more of them find that the party is not incompetent, they are to deliver their verdict accordingly; or if the same number decide against his competency, that they then find and determine the other facts directed to be inquired of; and that if twelve of them cannot agree either way, they report the fact to the commissioners, that their return may be made accordingly. And in relation to every legal question arising in the execution of the commission, a majority of the commissioners must decide.

New commission issued.

On the new commission the jury found that Arnhout was not incapable of managing his affairs by reason of habitual drunkenness; and his counsel thereupon applied for an order that his sons in law who had prosecuted the commission pay the costs incurred by Arnhout.

October 6th.

J. V. N. Yales, for Arnhout, contended that according to the decisions in Chancery Arnhout was entitled to his costs. A trustee was liable to pay costs in all cases of gross negligence, or where there has been any irregularity in his proceedings. (*Tireland v. Wilson*, 6 John. Ch. R. 411.) Standing by and seeing a deed executed without objection, and afterwards asserting a claim under a prior conveyance in opposition to such deed, would subject a party to costs.

1829. (*Livingston v. Byrne*, 11 John. 555.) Misrepresentation was also a ground for imposing costs. (1 Marshall, 192.)
 In the Matter of Arnhout. Wherever a petition for a commission of lunacy is irregular, [*500] *it will be denied with costs. (*High Lunacy*, 22, 77; *In the Matter of Hogan*, 3 Atk. R. 813; 2 Atk. 52; Barnadiston's R. 356.) So where an application has proceeded from bad motives and not from a sense of duty, it will be refused with costs. (*Moses and others v. Murgatroyd*, 1 John. Ch. R. 473.) Pertinaciously pressing this prosecution to a third trial subjects the prosecutors to costs. Fraud and bad motives on their part may be inferred from the circumstances of the case, which always are punished with costs. (*Denton v. McKenzie*, 1 Dessau. R. 289, 300; 6 Har. & John. R. 435.) Arnhout's estate cannot be charged with costs, the inquisition having been found in his favor. (*Ex parte Glover*, 1 Merriv. 269; *Sherwood v. Sanderson*, Coop. R. 108.) The jury were correct in finding that Arnhout was not incapable of managing his affairs by reason of habitual drunkenness. If the finding had been confined to habitual drunkenness, it would have been defective; because drunkenness is not *per se* incapacity, as is the case with lunacy. A return is strictly correct when it negatives the words of the commission. (*Ex parte Cranmer*, 12 Ves. 445; *Ridgeway v. Darwin*, 8 Ves. 65; *Ex parte Barnsley*, 3 Atk. 168.)

J. Lansing, contra:—The inquisition is irregular. It should have found that Arnhout was not now incapable, &c., and had not been for a certain time previous; for if incapable when the petition was presented, the prosecutors are clearly not liable to costs. The inquisition should also have found that Arnhout was not an habitual drunkard. It is void for this omission. (*Ex Parte Barnsley*, 3 Atk. 168; *Sherwood v. Sanderson*, 19 Ves. 286; *Ex Parte Cranmer*, 12 Ves. 445.) Where the finding is only for part of the issue, the whole is void. (*Patterson v. United States*, 2 Wheat. 225.) So a verdict is bad if it varies from

the issue. (*People v. Olcott*, 2 John. Cas. 301.) Also if it be uncertain. (Co. Litt. 227 n.; *King v. Dean of St. Asaph*, 3 T. R. 428.) The only issue in every case under the statute is as to habitual drunkenness. Capacity forms no part of the issue. The statute is remedial and must be construed liberally. Reasonable and fair applications under the statute ought not to be discouraged. They have in view the preservation of the happiness of families, and the *protection of property. If every unsuccessful application is mulcted with costs, persons will be deterred from presenting many cases to the Chancellor which require his interposition. The present application was made from honest motives and upon reasonable grounds. The difficulties the jury encountered in agreeing upon an inquisition, show there was probable cause for the prosecution. This alone is sufficient to protect the prosecutors from costs.

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THE CHANCELLOR:—After one jury had heard the testimony in this case, and had not been able to agree, the prosecutors applied and obtained a second commission, upon which it was found that Arnhout was incapable of managing his affairs in consequence of habitual drunkenness. The inquisition in that case was not set aside because the court supposed the jury had made an erroneous decision, but because there had been improper conduct on the part of the officer who summoned and had charge of the jury. Although upon the third commission it has been found that Arnhout is not a habitual drunkard, it does not, therefore, follow that the original petitioners are to be charged with the costs of Arnhout's defence. In applications of this kind the prosecutors are not chargeable with costs unless they have proceeded in bad faith, and without probable cause. (1 Collinson, 461.) There is nothing in this case to induce me to believe they did not think their father in law was in fact incapable of conducting his own affairs in consequence of habitual drunkenness. The verdict of the last jury is conclusive so far as it

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respects the appointment of a committee; but in determining the question of probable cause I must examine the evidence, and take into consideration the want of unanimity in the last jury, and the opinions of other jurors previously impanelled. For the determination of this question, it is sufficient for me to say I should not have been dissatisfied with the last verdict if it had been the other way. Malicious or improper prosecutions of this kind should never be countenanced; but it frequently is the duty of the friends of a man who gives himself up to the beastly vice of intemperance to apply and save his property. In such a case I shall never charge the prosecutors *with the costs of the defence, whatever may be the result of their application. No provision is made for the payment of their own expenses unless they succeed, however meritorious their proceedings may have been. (*Ex parte Ferne*, 5 Ves. 832.) But when an unsuccessful application is made, to charge them with the expenses of the party against whom those proceedings were had, they are entitled to their costs of opposing it.

The petition must be dismissed with costs.

WHITE v. WILLIAMS AND OTHERS.

Where upon a sale of lands the negotiable note of the purchaser is given for the purchase-money, the vendor retains an equitable lien upon the land, but an indorsee is not from the mere transfer of the note entitled to the benefit of such lien where the indorser has not been made liable upon his indorsement.

Where a judgment was entered on a bond and warrant, and a specification was filed under the act of April 21st, 1818, and it appeared no such consideration as that stated in the specification existed, the judgment was declared fraudulent and void as against other judgment creditors.

If a judgment is void as against a subsequent judgment creditor, it is also void as against a purchaser under the subsequent judgment.

In July, 1815, the defendants, C. & W. W. Williams purchased of L. Kingsbury a farm in the county of Madison, and gave to him their negotiable note for a portion of the purchase-money. He sold the note to the complainant, who afterwards negotiated it to J. & W. M. Burr; and the note not being paid when it fell due, the complainant was duly charged as indorser thereof. A suit was afterwards brought and judgment obtained in the name of the holders of the note against the drawers in the Supreme Court; which judgment was docketed and an execution issued thereon upon the 9th of January, 1819. The complainant afterwards paid the amount to the holders of the note, and took an assignment of the judgment. In September, 1819, he caused the farm to be sold upon the execution, and obtained a conveyance of the same from the sheriff. In November, 1818, *during the pendency of the suit upon the note, the defendants therein gave to R. & L. Williams, their mother and brother, a judgment bond for \$2,301 52; another to Parker and wife, their brother in law and sister, for \$912 70, upon which judgments were entered up and executions immediately issued; under one of which judgments the whole real and personal property, and some promissory notes of C. & W. W. Williams were turned out to the sheriff and sold. The farm was purchased at the sale by the mother, and the personal property and notes by the brother and brother in law.

The complainant filed his bill in this cause setting forth the above facts, and also alleging that the judgments thus confessed were fraudulent and given without consideration, and were intended to defeat the remedy upon the note; and also that the specifications filed at the time of entering up the judgments in conformity to the provisions of the act of 1818, were insufficient. He also insisted if the judgments were not invalid or fraudulent that he was entitled to a specific lien on the land, upon the ground that the notes were given for the unpaid purchase-money. The defendants in their answer denied all fraud in entering up the

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1829. judgments; and they set out the consideration upon which
 White The consideration however thus set out
 v. varied materially from that stated in the specifications.
 Williams. The defendants also insisted that the complainant was not
 a *bona fide* judgment creditor or purchaser, and therefore
 that he was not entitled to set up the insufficiency of the
 specifications.

The cause was heard upon the pleadings and proofs.

[*504] *C. Stebbins* for the complainant:—The judgments confessed by the defendants Cranston and William W. Williams to Rebecca and Lemuel Williams and to Barker and wife, were fraudulent as against the complainant. The consideration of these judgments, set forth in the answer of the defendants, varies from that stated in the specifications filed at the time of entering up the judgments. A part of the consideration was certain legacies given to the younger children by their father, and which were claimed by Rebecca Williams as their natural guardian. These legacies were charged *upon the real estate, and Rebecca Williams, neither as administratrix of her husband nor as natural guardian of the children had any right to them; (*Combs v. Jackson*, 2 Wendell's Rep. 153.) To render these judgments fraudulent as against the complainant for the purposes of relief, it is only necessary for him to show that they were given for more than was due the plaintiffs therein, and that the indebtedness is of such a nature as to render it inequitable for them to set it up against the complainant. The creditors here are family creditors, who have contributed to give a false credit to the debtors. The time at which these judgments were confessed shows that the object was to avoid the payment of the complainant's debt. Circumstances like these have been held sufficient to invalidate a conveyance even to an innocent grantee. (*Hildreth v. Sands*, 2 John. Ch. R. 35.) A fair judgment if used by a debtor to affect a change of property for his own benefit is fraudulent as to other creditors; (*Williams*

v. Brown, 4 John. Ch. R. 682.) The judgments under which the defendants claim are invalid for want of proper specifications under the act of 1818, p. 280; (*Lawless v. Hackett*, 16 John. R. 149; *Brinckerhoof v. Marvin*, 5 John. Ch. R. 325; *James v. Johnson*, 6 John. Ch. R. 433.) The complainant is a *bona fide* purchaser within the meaning of the act; (*James v. Johnson*, 6 John. Ch. R. 433; *James v. Morey*, in error, 2 Cowen, 290, 311.) The complainant also stands in the place of the vendor, and has as his indorsee an equitable lien upon the premises for the purchase-money, which will be enforced against the defendant Rebecca Williams; (*Hughes v. Kearney*, 1 Sch. & Lef. 132; *Mackreth v. Symmons*, 15 Ves. 329.) It was not necessary to make either Kingsbury or the Burrs parties, they having no interest in the controversy; (*Whitney v. McKinney*, 7 John. Ch. R. 144.) The lien for purchase-money will be decreed against a purchaser with notice; (*Ex parte Loaring*, 2 Rose's Cas. in Bank. 79; *Mackreth v. Symmons*, 15 Ves. 329; *Adair v. Shaw*, 1 Sch. & Lef. 262; *Champion v. Brown*, 6 John. Ch. R. 403; *Garson v. Green*, 1 Id. 208.) Purchasers coming in by act of law as assignees of bankrupts are bound by the lien without notice. Sugden's Law of *Vendors, 364.) So is a purchaser under a judgment; especially if he be the judgment creditor. The defendant Rebecca Williams purchased with notice.

J. A. Spencer, for defendants:—The answer of the defendants denies all fraud. It is in response to the bill and is uncontradicted. It being established that the judgments were valid, it is of no importance how the property was used after the sale. (*Lenox v. Prout*, 3 Wheat. 527; *Hart v. Ten Eyck*, 2 John. Ch. R. 92; *Clason v. Morris*, 10 John. R. 542; *Woodcock v. Bennet*, 1 Cowen's Rep. 743.) The circumstances of the family were such that no visible change could take place in the use of the property. The defendants who are judgment creditors had no knowledge of the suit commenced upon the Kingsbury note; and it would be immaterial if they had, as their debt was a *bona*

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vide one and the debtors had a perfect right to give them a preference by confessing judgment in their favor or otherwise. (*Wilder & Hastings v. Winne & Fonda*, 6 Cowen, 284.) The complainant having failed to impeach the consideration of the judgments, his suit must fail, as fraud out of the case is no ground for the bill. (*Lyon v. Richmond*, 2 John. Ch. R. 58.) The defect in the specifications, if any, cannot be taken advantage of by the complainant, he not being either a judgment creditor or a purchaser within the meaning of the act. (Laws of N. Y. sess. 40, 1818, ch. 259, sec. 5.) He is only the assignee of a judgment creditor. The act ought not to be extended by construction. (*Saving v. Brinckerhoff*, 5 John. Ch. R. 331.) The complainant cannot charge the land with the payment of Burr's judgment on account of any lien for the amount of the note given to Kingsbury for the purchase-money. Such lien has never been enforced except against the vendee, his heirs, or a purchaser with notice. (*Garson v. Green*, 1 John. Ch. R. 308; *Hughes v. Kearney*, 1 Sch. & Lef. 132.) In this case notice is fully denied. But if there had been notice, no person but the original vendor could enforce the lien; or, at least, it must be done in his name. The omission to make Kingsbury, the vendor, a party, is a complete waiver of the lien. The defendants *Rebecca and Lemuel Williams and Baker and wife have an equitable lien upon the land in question, upon the ground that the same was purchased with their money. (*Foot v. Colvin*, 3 John. R. 216.) Rebecca was entitled to the guardianship of her infant children, (Coke's Litt. 88 b, n. 13; id. n. 16, 90, a 1; *Byrne v. Van Hoesen*, 5 John. R. 66;) and as such guardian, to the possession of their estate.

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THE CHANCELLOR :—The claim of the complainant for a specific lien on the premises upon the ground that his judgment was obtained on a note given for a part of the purchase-money cannot be sustained. At the time he bought the note of Kingsbury the latter unquestionably had such a

lien; but it is not pretended there was any agreement that such lien should be transferred to the complainant. If Kingsbury could be considered as still retaining any such claim after the transfer of the note, it must be on account of his liability as indorser thereof. But there is no evidence or even allegation that any steps were taken to charge him as indorser. In a recent case where the vendor had negotiated the note but was obliged to take it up himself when it fell due, Lord Eldon sustained the claim of the original vendor to a lien on the land. (*Ex parte Loaring*, 2 Rose's Ca. 79.) But I am not aware of any case where the assignee of the note, or other security, has been permitted to sustain such a claim on an implied agreement to assign the lien.[1.] In the case of *Mackreth v. Symmons*, (15 Ves. 829,) cited by the complainant's counsel, there was an express agreement at the time of the sale, that the purchase-money should be applied to the payment of the vendor's debt to the third person. If Kingsbury holds any such lien as trustee for the holder of the note, he should have been a party to this suit. But I am satisfied that the sale and prosecution of the note to judgment in the name of the indorsee must be considered as a waiver of the original implied lien for the purchase-money on the land.

It is not necessary for me to examine the question whether the specifications filed are sufficient on their face to sustain the judgments, agreeably to the decision of the Supreme *Court in *Lawless v. Hackett*, (16 John. R. 169,) and of this court in *Brinckerhoff v. Marvin*, (5 John. Ch. R. 320.) I am inclined to think that most of the items in both specifications may be sufficient; but they can only be sustained by giving to them a construction which, as it now appears, is wholly fictitious and false. For instance, the largest item in the first specification is "Sealed obligation, dated 2d April, 1816, for the third part of the real estate of Wareham Williams, deceased, of which Rebecca Wil-

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[1] *Brush v. Kinsley*, 14 Ohio, 30; *Brigg v. Hill*, 6 How. Miss. R. 362; *Bland's Ch. R.* 524.

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liams was endowed, \$1,145 50." Perhaps this might be sufficient to give notice to all persons interested, that this note was given for the purchase-money on a sale of one-third of that real estate by the plaintiffs in the judgment to the defendants. But understood in that way, it would be wholly false and fictitious. By the answer it appears that one of the plaintiffs in that judgment was devisee of one-third of such real estate, and one of the defendants was devisee of the other two-thirds; that they both joined in the sale, and each received their just proportion of the purchase-money; and that the note was given some years afterwards to the mother alone; and the alleged consideration thereof is goods sold and money lent at various times, which it is impossible for them now to recollect; which money and goods she had taken in payment on the sale. And the same difficulty exists with respect to almost every item in this specification. In the other specification the principal item is "Two notes given for the principal and interest of lands sold by Anne Wood, now Anne Barker, and late Anne Williams, in the town and county of Madison; defendants had the money for which the land was sold, \$846 30." The allegation now set up in relation to this is that Granston Williams purchased of her about thirty-two acres for which he never paid the purchase-money; that he afterwards sold it to Hazard and took his notes for the purchase-money, which are probably the same notes sold under the execution and purchased by L. Williams. The statute requiring these specifications to be filed, expressly declares that if the judgment is afterwards drawn in question, the plaintiff shall be bound and concluded by the specification filed, and shall not thereafter be allowed to set up or insist *on any consideration for the judgment, not mentioned and contained in such statement and specification. (Laws of 1818, ch. 259, sec. 8.) Whatever my opinion might be as to the consideration of these judgments, which is now set up in the answer, I am satisfied the defendants cannot avail themselves of it under these

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specifications; and the judgments must, therefore, in the language of the statute, "be taken, deemed and adjudged fraudulent as respects any other *bona fide* judgment creditors." There is no doubt the complainant is in a situation to take advantage of the statute remedy. He is a *bona fide* assignee of the judgment, and had an equitable interest in it for his own protection, as indorser of the note, even before that assignment. As a purchaser of the premises under the judgment, he is also entitled to all the rights which the judgment creditor could have. (*Hildreth v. Sands*, 2 John. Ch. R. 35.)

Independent of the constructive fraud arising from the provisions of the statute, there is strong reasons for believing these judgments were confessed and used for the express purpose of screening the whole of the defendant's property from the operation of the judgment, which was about to be obtained on the note given by them. The judgments were given pending that suit; and by the stipulation in the case it is admitted that all parties had notice of the note, and of the pendency of the suit thereon. It is true a copy of what purported to be a further answer was served, in which all the defendants say they had no knowledge that any such suit was pending at the time these judgments were given. If such an answer had actually been put in, it would not, under the circumstances of this case, be entitled to any credit. And from the certificates of the register and clerk, it appears that if any such further answer was sworn to by them they have not dared to put it on file. At the sale, the property was all bid in by the family; and even notes against a responsible person for \$650 were turned out to the sheriff, and sold for the nominal sum of \$35; and since the sale down to the time of taking the testimony in 1827, the property had remained in the hands of the original owners without any visible change in their manner of using and disposing of the same.

*There must be a decree declaring both judgments fraudulent and void as against the complainant; and the posses-

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sion of the farm must be delivered up to him; and the defendant must execute to him a good and valid release for the same in fee, to be approved of by a master; and the defendants must also pay to the complainant his costs in this suit to be taxed.

DUSTAN v. DUSTAN AND OTHERS, EXECUTORS, &c.

Where a testator directed his executor to pay one of his sons annually \$200, and also one-fifth of his estate, in case of his reformation from vicious habits, it was held that the executors acted correctly in not paying over the one-fifth of the estate, until they were satisfied of the son's complete reformation.

And where the executors not being satisfied of such reformation, refused to pay over the one-fifth of the estate, they were allowed their costs of defending a suit commenced to compel such payment.

Where the suit had been pending some time, and the executors in their answer expressed a desire and willingness to pay over the money under the direction of the court, it was referred to a master to inquire and report whether a permanent reformation had taken place.

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THE defendants being the executrix and executors of the will of the complainant's father, were required by the will to pay to the complainant annually \$200, and also one-fifth of the testator's estate, in case the complainant should refrain from vicious habits, and conduct himself with sobriety and good morals. About two years after his father's death the complainant filed his bill against his mother and the other personal representatives of his father, insisting that he had reformed, and claiming the payment of his share of the estate. The defendants had refused to pay over to the complainant his one-fifth of the estate, not being satisfied of his complete reformation. The cause was submitted on the pleadings and proofs.

P. V. Remsen, for the complainant.

W. P. Hawes, for the defendants.

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*THE CHANCELLOR:—It is admitted in this case that the complainant, at the death of his father, was irregular in his habits, and dissipated. It was undoubtedly the intention of the testator that he should not receive his share of the property until his mother and the other executors of the will were satisfied that he had permanently reformed. By their answer it appears they do not believe this is the case. The testimony which has been taken shows that he has conducted himself well, so far as the witnesses know, since his father's death. But only a very few witnesses have been examined to this fact, and the intention of the testator would be defeated if the complainant should receive this bequest before he is so far reformed as to render it very certain he will not return to his former vicious courses. The time which had elapsed between the death of the testator and the filing the bill in this cause was not sufficient to enable the executors to form any correct opinion as to the permanency of his good conduct. They were therefore right in refusing to place the whole property in his hands at that time. As some time has elapsed since the commencement of this suit, and there is ground to believe that the complainant may have commenced a course of good conduct with a *bona fide* intent to entitle himself to the bounty of his father by a permanent reformation, I shall not dismiss the bill in this cause, but shall direct a reference to Benjamin Clark, a master of this court, to ascertain and report whether there has been such a permanent reformation in the character and habits of the complainant as to entitle him to receive the whole amount bequeathed to him, at this time; and on the coming in and confirmation of the master's report, if it shall appear that such permanent reformation has taken place, that the executors be permitted to pay the whole sum to him, after deducting therefrom their costs of this suit to be taxed. And if the parties cannot agree upon the amount to which he is entitled, that there

1829. be a reference to a master to take an account and ascertain
 The Attorney such amount. And if it shall appear by the report of the
 General master on the first reference hereby directed that such per-
 v. manent reformation has not taken place, then the complain-
 Bank of Co- ant's bill is to be dismissed, with costs.
 lumbia.

[*511] *THE ATTORNEY-GENERAL v. THE PRESIDENT, DIRECT-
 ORS AND COMPANY OF THE BANK OF COLUMBIA.

Whenever a bank becomes insolvent and unable to pay its debts, the act of April, 1825, (Sess. Laws of 1825, ch. 325, sec. 17,) makes it the duty of the attorney-general to apply to the Court of Chancery for an injunction against the officers of the corporation, to restrain them from exercising any of the corporate franchises, and for the appointment of a receiver to take charge of the property and effects of the institution, and to collect and distribute the same among its fair and honest creditors.[1]

An information, verified by the oath of the attorney-general, setting forth that the bank had stopped payment, that a large amount of its bills were notoriously in circulation, and that it was reputed to be insolvent; and accompanied by the further statement of the attorney-general, under oath, that he believed the bank was insolvent, is sufficient to authorize the court to grant an injunction and appoint a receiver, where there is no denial by the corporation of the facts stated in the information.

A party who cannot be presumed to have positive knowledge of a fact, may swear according to his information and belief; and if it be not denied by the adverse party, who can swear positively upon the subject, it will be deemed as admitted.

Upon proceedings against a bank, under the statute for insolvency, an officer of the corporation is not a proper person to be appointed the receiver.

Where the corporation appealed from the decision of the court both as to the appointment of a receiver and as to the principle adopted of excluding its officers from the appointment, the court would not, pending the appeal, appoint a receiver, as long as there was no ground to apprehend danger to the fund before a decision could be had on the appeal.

[1] 2 R. S. (4th ed.) 607, sec. 47; *Verplank v. The Mercantile Ins. Co. of New York*, 2 Paige, 438; *Bank of Com'rs v. Bank of Buffalo*, 6 Paige 498.

IN this case the court on a previous day had granted an injunction against the Bank of Columbia, upon the application of the attorney-general, and had made an order for the appointment of a receiver to take charge of its property and effects, and had referred it to a master to receive nominations of suitable persons as receiver, and to report as to the competency of the persons named and the sufficiency of the sureties offered by them respectively. And now, on behalf of the attorney-general, a motion was made for the appointment of such receiver; which motion was resisted upon the ground that the bank had appealed to the Court of Errors from the decision of the Chancellor both as to the appointment of a receiver of the bank and as to the principle of the order, by *which he had excluded the officers of the institution from being nominated as such receiver.

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A. *Van Vechten* for the bank:—An appeal having been brought to the Court of Errors, all further proceedings are stayed. No steps can be taken, unless some necessity involving the preservation of the rights of the parties require it. All interlocutory orders of this court which involve the merits of the cause may be appealed from. (*Buel v. Street*, 9 John. R. 443; *Beach v. Fulton Bank*, 2 Wend. 225.) An appeal in the first instance stays all proceedings, and if further proceedings become necessary, a special application for that purpose must be made; notice of which should be given, to give the appealing party an opportunity of being heard.

The present is a vital proceeding to the bank and its creditors. The court in case of an appeal never act except upon the urgency and necessity of the case, and in order to prevent injustice, as where the debt is in jeopardy; and then, the court offer an alternative to the party to bring the money into court or to give security. (*Missionier v. Kauman*, 3 John. Ch. R. 66.) This court cannot act except judicially upon facts proved. There is now before the

1829. court nothing to authorize them to proceed. The discretion of this court to act is not a mere volition, but a sound and enlightened discretion; which is subordinate to the discretion of the Court of Errors. Nothing appears from the information of the attorney-general, to show that this is a case of urgent necessity. The attorney-general swears to the information from his belief. The only fact within his knowledge is that the bank has stopped payment. This is not conclusive as to its insolvency. The act only authorizes the attorney-general to proceed in case of the insolvency of the bank. On this fact there ought to be conclusive evidence, before the court proceeds. The affidavit of the attorney-general as to his belief, is not sufficient to authorize an injunction. If so, it cannot be sufficient to warrant the extraordinary proceedings of the appointment of a receiver. (*Attorney-General v. Bank of Niagara*, 1 Hopk. R. 354.) The act of April 21, 1825, secs. *6 and 17, recognizes the distinction between a temporary suspension of payment and an actual insolvency. The legislature did not intend that a mere non-payment of debts should be evidence of insolvency. Banks may be embarrassed; the public interest may require the suspension of specie payments. This was the case during the last war. It was not then deemed evidence of insolvency. No proceedings can be had under the 17th section of the act for a mere temporary suspension of payment; but only in cases of actual insolvency. Such a construction must be given to the statute as will render effectual all its provisions.

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J. Sudam, contra :—This case is distinguishable from all the cases cited by the opposite counsel. In those cases evidence of the facts which required proceedings subsequent to the appeal, did not accompany the appeal as in this case. It was therefore necessary in those cases to give notice to the opposite party, to afford him an opportunity of being heard. In this case the information states the charge of insolvency specifically; and the bank have had an opportunity of an-

swering that charge. The insolvency intended by the act, is where a corporation is unable to pay its debts. The information upon this point is conclusive until contradicted. A suspension of payment is evidence of insolvency. No fact alleged in the information has been denied by the Bank of Columbia. The question is, shall the funds of the bank be secured for the benefit of the creditors? The appointment of a receiver is necessary for this purpose. It is in evidence that the bank is insolvent: would it then be proper to leave its property in the hands of the directors, under whose administration the bank has failed?

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A. L. Jordan appeared for certain of the creditors and stockholders who had petitioned for the appointment of *E. Williams*, the president of the bank, as receiver. Mr. Jordan contended that the interest of the bill holders was made by the statute the paramount interest. Next to their interest was the interest of the stockholders. The policy of the act is to protect the creditors. This will be most effectually done by those who have an interest in the institution. If the failure of a bank is not conclusive evidence of fraud, then its officers are not ineligible to the appointment of receiver. Until the case of the Franklin Bank, it was always the practice to refer it to the master not only to judge of the fitness of the person nominated as receiver, but to make the appointment. (*Oreuze v. Bishop of London*, 2 Brown's Ch. C. 253; *Tharpe v. Tharpe*, 12 Ves. 317; *Thomas v. Dawkins*, 3 Brown's Ch. C. 509.) In *Jenkins v. Jenkins*, (1 Paige's R. 243,) it was referred to a master to appoint a receiver. (*Haggerty v. Pittman*, 1 Paige's R. 298.)

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J. S. Van Rensselaer, advocated the appointment of *William B. Ludlow* as receiver.

J. Sudam, in reply, nominated on behalf of the attorney-general *Rufus Reed*. He contended that the interests of the bill-holders would be best consulted by the appoint-

1829. ment of a person not interested in the bank. Such an ap-
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THE CHANCELLOR:—By the act of April, 1825, (Sess. Laws of 1825, ch. 325, sec. 17,) it is made the duty of the attorney-general, whenever any incorporated bank is insolvent and unable to pay its debts, to apply to this court for an injunction, restraining the officers of the institution from exercising any of the privileges and franchises granted by their charter, and from collecting or receiving any debts, and from paying out or in any way transferring any of the moneys or effects of such company; and to appoint a receiver of its property, moneys and effects, and to distribute the same among its fair and honest creditors. About the 20th of May last, this bank stopped payment. This was a matter of public notoriety. It was also notorious that a large amount of its bills were in circulation; and the institution was reputed to be insolvent. It was therefore the imperative duty of the attorney-general to proceed in the manner directed by the statute.

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On the 13th of June last, he filed the information in this case, setting forth the above facts, and also that the state was a large stockholder in the institution. The information was *verified by his oath, and that of the comptroller; and they also stated their belief that the bank was insolvent and unable to pay its debts; and thereupon an injunction was granted which still remains in full force. The attorney-general also caused a copy of the information and affidavits to be served on the officers of the bank, with a notice requiring them to show cause, if any they had, why a receiver should not be appointed. In the meantime similar information had been communicated to the court by the oath of certain creditors of the institution, who had applied and obtained injunctions in the city of New York. At the time assigned the parties appeared: but no cause was shown to induce the court to believe that the bank was

able to pay its debts; and no information was given in relation to its concerns, the probable amount of its debts, or its means of payment. The attorney-general had done all that could be done by him in any case, to satisfy the court that the bank was insolvent. No person could swear positively as to the insolvency of the institution, except its officers, against whom the proceedings were instituted; and the statement of the above facts was all that could reasonably be called for under this part of the statute. A violation of several provisions of the act of incorporation subjects the institution to similar proceedings. In those cases the particular violations of the charter complained of can and ought to be stated. These undoubtedly are the particular facts and circumstances, which by the statute are required to be stated in proceedings against the bank. Where a party cannot be presumed to have positive knowledge of a fact, it is the constant practice of this, and of all other courts, to permit him to swear to his information and belief; and give the adverse party, who alone can swear positively on the subject, an opportunity to deny it on oath. If he does not deny it, or furnish some explanation to induce the court to think otherwise, the belief of the other party is to be taken as the fact. That the bank had stopped payment was not of itself conclusive evidence of its inability to pay its debts; but it was at least *prima facie* evidence of such inability or insolvency. And the evidence to explain the transaction and rebut that presumption should have been *furnished by the officers of the institution. They could have shown the fact, if any thing but the insolvency of the corporation had induced or compelled them to adopt a measure which in its consequences produced so much individual suffering and distress. These were the reasons which made it the duty of the court to order a receiver to be appointed. The fact of insolvency being established, the court had no discretion on the subject.

Another important question presented to the court at that time was whether one of the officers of the insolvent institu-

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tion should be appointed to investigate and close its concerns. Under the circumstances I thought there could be no room to doubt the decision which ought to take place on that question. The officers of the institution had made no expose of their concerns to the public. When called upon to show cause why a receiver should not be appointed, they produced no account, nor gave any information to the court as to the amount of their debts or their means of payment. They did not even state when, or by what means, their capital of one hundred and sixty-nine thousand dollars had been lost; so as to enable the court to form an opinion whether it would be right or proper to entrust the interest of their numerous creditors to the care or management of one of their number. It was impossible to ascertain, without a long and tedious examination of some weeks, and perhaps months, whether it might not be the duty of the receiver to institute proceedings against every officer of the corporation, under some of the provisions of the statute of 1825. If the property of the institution had been assigned by them to pay favored creditors, in contemplation of insolvency, or after they had stopped payment, it would be the duty of the receiver to prosecute them for the purpose of obtaining the amount for the benefit of the creditors generally. If they were indebted to the institution, it might be necessary to enforce the collection of such demands by suit. And if there had been fraud or mismanagement on the part of the officers of the institution, by which they had made themselves personally liable to the creditors, it would be the duty of the receiver to investigate the subject, and expose the fraud if any existed. *These remarks are not intended to apply personally to any of the officers of this institution except so far as relates to indebtedness. It was admitted by the gentleman proposed as receiver that he was a debtor; but whether to a large or small amount the court was not informed. Although the Chancellor, from a knowledge of the character of the gentleman who had controlled the affairs of this institution, was satisfied no fraud had

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been committed, yet he still had a duty to perform as regarded the public. Those creditors who had been stripped of their property by the failure of the bank, had a right to claim from the court the appointment of a receiver upon whose impartial investigations they might rely, and who could have no interest in opposition to theirs. So far as respected myself, I did not believe any thing improper had been done in that institution for many years past, to produce this calamity. I am induced to give credit to the suggestion of the counsel, that the death-blow was given to the institution long since, and that it has been sustained for many years only by a pledge of the personal responsibility of a majority of the directors. I was aware, from the report of certain proceedings made to the legislature in 1820, that as early as 1818, the officers of the bank had found it necessary to make provisions for a permanent loan of \$150,000, from another institution; and for which a majority of the directors gave their own personal bonds, from year to year, as collateral security; and that the stipulated time of 15 years, for the continuance of that loan, had recently expired. It was to that circumstance I attributed the failure of the institution at this time, and not to any recent mismanagement of its concerns by any of the directors. The rule adopted in this case was the same which was adopted in the case of the Franklin Bank. I decided that it would be improper to appoint one of the officers of the institution receiver, and I referred it to a master for the purpose of enabling every person interested in the institution to name such person for that purpose, as he might think proper. The rule of exclusion adopted, I considered as based upon sound principles of public policy; and upon what I considered *the spirit and intent of the act under which these proceedings were instituted. If the law will not entrust the concerns of an insolvent institution in the hands of its directors jointly, as trustees for the creditors, certainly the court ought not to entrust them to a part only as receivers. Public policy requires that the directors shall

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understand distinctly that if they so manage the concerns of the institution as to produce insolvency, the property and effects of the institution will be taken from them entirely; and be placed in the hands of those who will investigate their conduct fearlessly and impartially.

The corporation appealed from the decision, both as to the appointment of a receiver, and as to the right of its officers to have the appointment if one is to be made. This objection is now interposed to prevent any further proceedings in this matter pending that appeal. It is undoubtedly correct, as suggested by the counsel who made this objection, that ordinarily, in this court, an appeal suspends, in the first instance, all further proceedings on the decree or order complained of. It may be doubtful whether this is a case where an appeal from the order directing a receiver to be appointed would prevent the court from proceeding so far as to designate the person to be appointed, that he might be prepared to act when the Court of Errors had disposed of the appeal. And if there was in the mean time any danger to the fund, the court might, on a proper application, direct him to do every thing necessary to protect the interest of all concerned, pending the appeal. But in this case a principle is involved in one part of the decision, which makes it proper for this court to forbear naming a receiver until the court of *dernier* resort have determined whether the officers of a bank which has become insolvent under their management, are proper persons to investigate the manner in which they have discharged their trust, and to close up the concern. If the interest of stockholders was to be consulted primarily, it would be proper to give to those indebted to the bank, and in doubtful circumstances, sufficient time to buy up the bills from honest creditors, at a great discount, and thus restore the broken institution to a state of solvency. But in that *case the real creditors would lose the greatest part of their debts, although the stockholders in the end might save something on their stock. It is therefore necessary and proper, in every case

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of this kind, for the protection of the creditors, who have the first claim upon the property of the institution, to turn its effects into cash with the least delay which is consistent with their interest ; so that a distribution may be made before their necessities or fears compel them to sacrifice their demands to speculators. As the Court of Errors will be in session very shortly, when this question can be disposed of, I do not think there will be such an injury resulting from the delay in this case as should induce the court to take any further steps in the matter until that time.

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The attorney-general has furnished no evidence that the funds of the bank are unsafe in the hands of the present officers ; and there is nothing before me to show that they have so far involved themselves in this concern as to make their own solvency depend upon that of the institution. I shall, therefore, suspend the appointment of a receiver until the meeting of the Court of Errors, unless some person interested in the institution brings the case again before me, upon a suggestion that something further is necessary to be done for the safety of the fund. If that should be the case, it may be necessary to proceed in the appointment, as no authority for that purpose can be given to the directors, pending this appeal.

LEE, APPELLANT, *v.* HUNTER AND HALLENBECK,
RESPONDENTS.

Where S. being indebted to several persons, was in September, 1817, sued for a default in paying over moneys received as a commissioner of loans, and judgment was recovered against him on the 31st of January, 1818, and on the 1st of January, 1818, S. conveyed to L. his farm and all his personal property for the nominal consideration of \$8,501 25, \$4,000 of which was paid in Virginia lands which had been purchased by L. 20 years before, but which he had never seen or possessed, and there was no proof of the payment of the residue of the consideration, and S. continued in possession

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of the property so conveyed to L, it was held that this conveyance was fraudulent and void as against the creditors of S.

*Under the absconding and absent debtor act, an equitable interest of the debtor in real property can be attached by the sheriff, and the same passes to the assignee appointed under the act.

The surplus of the debtor's property, after all his just debts are paid, must be refunded to him.

But before this can be done, the creditors must be notified to exhibit their claims pursuant to the directions of the act, or they must have an opportunity of being heard.

The proper course for the debtor to obtain the surplus would be to file a bill and make the trustees parties; and if they had not given the requisite notices to the creditors, notice might be given under the decree of the court, in the manner adopted of calling in creditors under a decree.

August 4th.

THIS was an appeal from the decree of the Equity Court of the third circuit, on a bill filed by Lee against the respondents, and a cross bill filed by them against Lee in that court.

Stoddard Smith, the son in law of the appellant, was formerly the owner of a farm in the town of Greenville in the county of Greene. He, together with the respondent Hallenbeck, were the commissioners of loans for that county under the act of 1808. In 1817, Smith received the interest moneys on the mortgages, but made default in paying the same over to the treasurer. In consequence of this default a suit was commenced in September 1817, against the commissioners and their surety, upon their official bond. A judgment was obtained in that suit, in the Supreme Court, for \$750 48, for the damages and costs, on account of the breach of the condition of the bond, which judgment was docketed on the 31st of January, 1818. In May term, 1817, P. Conine commenced a suit against Smith in the Supreme Court, upon a promissory note, which was tried in April, 1818, and a verdict found therein for the plaintiff, upon which a judgment for \$667 84 was entered, and docketed on the 14th of May, in the same year. On the 1st of January, 1818, during the pendency of these suits, and a few days before the judgment in behalf of the state was entered, Smith conveyed to Lee all his personal

property, and to him a deed of the farm. The consideration expressed in the deed was \$8,000, and in the bill of sale, \$501 25. On the 21st of May, 1818, an execution was issued by Conine, upon his judgment, to the sheriff of Greene, who levied the execution upon the real and personal property sold by Smith to Lee. *The farm was sold on the execution to Conine on the 15th of September, in the same year, for the sum of \$20. Lee replevied the personal property, and upon a trial at the circuit before Judge Van Ness, in December, 1819, a verdict was found therein in favor of the sheriff, upon a plea of justification under the execution. After the issuing of this execution, but before the sale of the farm, Lee made a compromise with Hallenbeck, by which he conveyed to the latter thirty-two acres of the farm, for the nominal consideration of \$952 64, the amount of the judgment on the loan office bond, together with the costs which had accrued in that suit. Hallenbeck at the same time executed a written defeasance, reciting that the deed had been given by Lee to him only as security for the amount of such judgment and costs, which he thereby agreed to pay, and to indemnify Smith against. Hallenbeck by the defeasance also stipulated that Lee should enjoy and occupy the land; and if he paid the interest annually on the above amount, and the principal at the expiration of two years, he would reconvey to him the thirty-two acres. The deed was acknowledged on the day of its date, before Smith, and was recorded on the 10th of September, 1818, in the book of deeds; but the defeasance was never acknowledged or recorded.

After the sale of the farm on the Conine judgment, and for the purpose of overreaching that sale, Hallenbeck presented a petition to the legislature, to which Smith annexed a written consent, setting forth the recovery of the judgment on the loan office bond, and requesting permission to enforce it against the separate property of Smith, upon his (Hallenbeck's) paying or securing the payment of the amount due to the state. On the 13th of April, 1819,

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the legislature passed an act authorizing the comptroller to assign the judgment to Hallenbeck, upon his giving real security for the payment of the debt to the state; and also authorizing Hallenbeck to take out an execution upon the judgment, and to collect the amount out of the separate property of Smith.

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Two days after the verdict in the replevin suit, Lee and Smith compromised with Conine and his attorneys, and gave their joint and several sealed note to Conine for \$790, payable *in one year with interest. They also gave to the attorneys, for the costs and counsel fees in the several suits which had grown out of the controversy, another joint and several sealed note for \$410, payable in six months with interest. Conine at the same time gave to Lee an agreement, reciting the giving of these notes, and also reciting that Smith was indebted to Hallenbeck in the sum of \$858, or thereabouts, being the amount for which Hallenbeck was responsible to the state, and which was the proper debt of Smith; by which agreement Conine covenanted that if Lee and Smith paid the notes when they became due, and secured Hallenbeck against the demand in favor of the state, then, and not until then, he (Conine) would quit claim to Lee, with covenants against his own acts, the farm which he purchased at the sheriff's sale, and on which Smith resided. Before either of the notes fell due, Lee left this state and went to Vermont, where he has ever since resided. On the 8th of June, 1820, Hallenbeck applied to the comptroller and obtained an assignment of the judgment, in pursuance of the act. On the 10th of August an execution was issued thereon by the written consent of Smith, upon which the farm was sold on the 7th of October, 1820, and bid in by Brigham, the son in law of the latter, for \$1,000. On the 14th of October, Brigham assigned his bid to Hallenbeck, in consideration of which the latter gave a receipt in full to the sheriff on the execution, and Smith gave a release to the sheriff for the surplus raised on the sale. A certificate of the sale was given and

filed according to law; and at the expiration of the fifteen months, the sheriff gave a deed of the farm to Hallenbeck, under the sale and assignment of Brigham's bid. Soon after the sale proceedings were instituted against Lee by Conine and his attorneys, before Chief Justice Spencer, under the act for relief against absconding and absent debtors; and upon his warrant the sheriff of Greene attached the farm and certain personal property as the property of Lee. The personal property was claimed by the son of Lee, and by Smith and another son in law; and upon a sheriff's inquest, the jury decided in favor of their claims. The usual notices were published; and on the 25th of July, 1821, the chief justice *made an order appointing A. Van Bergen, William Gay and William Chancey, trustees for all the creditors of Lee, in pursuance of the directions of the statute. The trustees a few days thereafter assumed the execution of the trust and took the oath required by law. In March, 1822, Hallenbeck and wife conveyed the farm to the defendant, Hunter, for the sum of \$4,100, out of which he received the amount due from Smith, and the costs and expenses which he had incurred. The two mortgages to the state and to Clowes also constituted a part of the \$4,100; and the balance was given to the agent who effected the sale to Hunter for Hallenbeck.

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In 1824, one of the attorneys of Conine followed Lee to Vermont, but finding that he had no property there out of which their debts could be collected, a compromise with him was effected, by which he was discharged from personal liability on the notes, on his paying them \$250. A release was thereupon executed by Conine and his attorneys, on the 24th of May, 1824, by which they released and discharged Lee from the payment of the notes; but with an express provision that it should not operate to discharge Smith from the payment of the notes, except as to the \$250, which was to be credited on the note of Conine. In 1825, Lee brought an ejectment suit against Hunter, for the recovery of the farm, which was tried at the April cir-

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cuit in 1826. The proceeding under the act against Lee were produced in evidence, and the judge decided that by the appointment of trustees the interest of Lee, if he had any of the premises, became vested in them. The plaintiff thereupon submitted to a non-suit.

Shortly afterwards the appellant filed the bill in this cause in the equity court of the third circuit, alleging that his purchase of the farm from Smith was honest and *bona fide*, and praying that the appointment of trustees might be vacated; that the sale and conveyance under the judgment assigned to Hallenbeck might be set aside and the judgment be declared satisfied; that he might be restored to the possession of the farm, and that the defendants might be compelled to account for the rents and profits thereof; and for general relief.

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*The respondents put in their answer, setting up the fraud in the conveyance from Smith to Lee, and alleging that the conveyance from Lee to Hallenbeck was not given in satisfaction of the debt due to the estate, but only as a security by way of mortgage; and that after the trial of the replevin suit that security was abandoned by the consent and understanding of the parties, on the ground that it had been defeated by the sale under the Conine judgment. By their cross bill they prayed that the deed from Smith to Lee might be declared fraudulent and void, and that the same might be decreed to be delivered up and cancelled, and for further relief against the appellant.

The cause was brought to a hearing before Judge DUER, in his equity court, and in November, 1827, a decree was made therein, dismissing the appellant's bill, with costs in the original suit and upon the cross bill, and setting aside the conveyance of January, 1818, as fraudulent and void.

OPINION OF JUDGE DUER :—From a full and deliberate consideration of the testimony in these causes, I am satisfied that the conveyance of the 1st of January, 1818, from Stoddard Smith to Noah Lee was not only a contrivance for de-

frauding certain creditors of Smith, but that its invalidity has been virtually admitted by both grantor and grantee. If I am right in this conclusion, upon the facts, it follows as a necessary legal consequence that nothing passed by that deed, inasmuch as it is void both at common law and by the statute of frauds, unless first, Lee acted in good faith, without any knowledge or co-operation in regard to the fraudulent purposes of Smith; or secondly, Hallenbeck has subsequently affirmed the conveyance, or ceased to be a creditor of Smith, and is thereby precluded from impeaching the deed on the ground of fraud.

I. In the case of *Anderson v. Roberts*, in Error, (18 John. R. 515,) it was held that a *bona fide* purchaser for a valuable consideration without notice of the fraud, whether the purchase be made from a fraudulent grantor or a fraudulent grantee, is equally protected by the proviso contained in the 6th section of our statute, as that proviso applies to the second *as well as to the third section of the act. To bring the present case within that authority and within the terms of the proviso, it must, however, appear that the deed of the first of January, 1818, from Smith to Lee, was made upon good consideration, as well as without notice on the part of the grantee of the fraudulent intent of the grantor.

Now, without entering into a minute examination of the various particulars set forth by Lee in his answer to the cross bill, as forming the consideration of the deed from Smith, I shall advert principally to the item of the Virginia land, conveyed in part payment by Lee to Smith, at the estimated value of \$4,000, and shall barely enumerate the rest. The whole consideration of the conveyance from Smith is stated at \$8,000, including two mortgages, by which the farm was incumbered to the amount of \$1,850. Nearly two-thirds therefore of the balance of the consideration, deducting these mortgages, consisted of this land in Virginia, which, however regular the paper title, is described with no greater certainty than as one thousand acres lying

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upon a branch of James river, in the county of Botetourt, of which Lee was never in possession, and seems literally to know nothing beyond what his title deeds have revealed to him, and of which Smith knows no more, does not pretend to have obtained possession, or to have attempted even the location. The nominal amount indeed of the consideration greatly exceeds the average valuation affixed to the farm by the witnesses, and hence it is contended on the part of Lee, that if the estimated value of the Virginia land was deducted, there would still remain a sufficient consideration for his purchase. But Lee, in his answer, expressly swears, that though he does not believe that at the time the deed was executed the farm could have been sold for cash for \$8,000, yet that he considered it worth that sum to him. If the estimated value of the Virginia lands be deducted from the consideration, there will remain a balance of \$2,150, exclusive of the mortgages, composed of the following items, viz: 1st. A promissory note of one Abraham Acorn, for about \$600, which was subsequently returned by Smith to Lee, and collected by him; 2d. A sum of \$750 *for money from time to time advanced by Lee to Smith; and 3d. Of Lee's bond or covenant to Smith for the balance of \$850, payable by instalments. Now, although the farm was eventually sold under Hallenbeck's execution for less than the aggregate amount of these last two items, yet Lee can derive no benefit from that circumstance, as he could not possibly have supposed that sum a sufficient consideration when he agreed to give so much more for it in his bargain with Smith, believing it, as he states, to be worth to him the full amount of \$6,150, exclusive of the incumbrances. For \$4,000 of this amount there has been, as I conceive, a failure of consideration, so that in reference to the alleged agreement between the parties, the remaining \$2,150, reduced further by the amount of the Acorn note to \$1,550, cannot certainly be deemed as sufficient consideration, and consequently cannot be regarded as a good one

according to the spirit or the letter of the statute, as it was evidently not the consideration intended by the parties.

In case, however, I should have mistaken the law on this point, I proceed to inquire whether in point of fact Lee had notice of the fraudulent designs of Smith in executing the conveyance in question?

Previous to and at the time of executing the conveyance, Smith declared to Lee his intention to provide for all his honest debts, referring particularly to Hallenbeck's liability for him to the state, and Lee agreed to pay Hallenbeck whatever Smith should owe on that account. No specific provision was made for the purpose, nor was there any fund applicable to it, except the bond of \$850, which was insufficient to have discharged the debt to the state together with the other demand against Smith, including Conine's, of which last Lee swears that he knew nothing. Admit this to be true, and Lee not to be chargeable with notice in respect to that demand, he was nevertheless apprised of Smith's defalcation as a commissioner of loans and of Hallenbeck's liability on that account; and although he assented verbally to the justice of making provision to meet it, yet he neglected to do so at the time of the conveyance, but took from Smith, his son in *law, such a transfer of his whole estate, real as well as personal, as left Hallenbeck (until upon pressing for security he afterwards obtained the conveyance from Lee) in no better situation than Conine or any other creditor of whose claim Lee might have been ignorant, and whom Smith may have intended to defraud. It is impossible, therefore, in the face of these facts to maintain that Lee had no notice of this effect of the conveyance, which affords the best evidence of the intent of the parties to hinder and delay, if not actually to defraud the state in recovering its demand from Smith, whilst it deprived Hallenbeck of the means of his indemnity. Nor from succeeding and progressive steps in the transaction, the dubious character of Lee's possession, the return of Smith to the premises, his disposition and removal of the personal prop-

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erty, his receipts of the rents and profits of the farm and the virtual abandonment of the conveyance upon the compromise with Conine, does it seem to me reasonable to believe that Lee could have entered into the arrangements with Smith in perfect good faith, notwithstanding the provision afterwards made for Hallenbeck's security out of the farm itself, when he appears thus to have co-operated and acquiesced in all those subsequent measures so strongly indicative of fraud.

If then the facts and circumstances of the case do not bring Lee within the protection afforded by the statute to a *bona fide* purchaser, it remains to consider:

II. Whether Hallenbeck has, by any act or assent of his precluded himself from impeaching the deed in question on the ground of fraud?

It is contended that he is estopped from controverting its validity, first, because he has affirmed it by taking a conveyance from Lee of thirty-two acres of the land in satisfaction of his claim against Smith; and secondly, from having in consideration of that conveyance assumed to discharge the debt due to the state, and thus divested himself of his character and rights as a creditor of Smith.

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1st. The conveyance of the thirty-two acres, if not made upon the suggestion of Lee or Smith, seems to have been accepted by Hallenbeck in despair of obtaining any other security; and he appears to have relied more on the covenants it contained than on the title it transferred to him. It was in fact a mortgage. No possession appears to have been taken under it. It was accompanied by an agreement in the nature of a defeasance, which expressly declares that the deed was given to secure Hallenbeck against the demand of the state, and some other advances he undertook to make for the benefit or account of Smith; and it became inoperative even as a security, in consequence of the invalidity of the deed from Smith to Lee, and the sale of the premises under the Conine judgment; on which ground it

seems to have been ultimately abandoned by the consent of all parties. But

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2dly. It is alleged that Hallenbeck in consideration of this conveyance assumed to discharge the debt to the state, and thereby divested himself of his right as a creditor, to impeach the deed from Smith to Lee. It is true that Hallenbeck, by the instrument accompanying the conveyance from Lee, agreed to discharge the debt to the state, and this formed the greater part of the consideration of the deed. But Hallenbeck was jointly bound with Smith to the state: until therefore he had paid the debt, he could have maintained no action against his co-obligor, and consequently so far from divesting himself by accepting the deed from Lee of his right as a creditor of Smith to impeach the conveyance to Lee, he could not before the actual payment of the money to the state, have impeached it in that character, but only in virtue of the general terms of the statute which extends relief to "creditors and others." Besides, the agreement in question fell with the deed which it accompanied, upon the result of the trial with Conine and the compromise which ensued; and another provision was made for the indemnity of Hallenbeck by an assignment of the title acquired to Smith's farm by Conine under his judgment, but this also fell through in consequence of the failure of Lee to perform his part of the agreement; and thus was Hallenbeck compelled to avail himself of the act passed with the consent of Smith in his favor, by satisfying in the manner permitted under its provisions the joint debt of Smith and himself, and thereupon *procuring the assignment of the judgment recovered by the state, and proceeding to the sale of Smith's farm under it.

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From the view I have taken of this case, it is unnecessary to pursue the subject further, or to enter into a discussion of the points raised at the hearing in regard either to Lee's ignorance of the act passed for the relief of Hallenbeck on the one side, or to the effect of the proceedings against Lee as an absent or absconding debtor on the other.

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My opinion on the question already considered leads me at once to conclude that Lee's bill must be dismissed with costs, and the relief prayed for by Hallenbeck and Hunter in their cross bill granted, by directing the deed from Smith and wife to Lee, of the first of January, 1818, to be delivered to the clerk to be cancelled, and that the costs of the cross bill be also paid by Lee.

P. S. Parker and A. Van Vechten, for the appellant:—The original bill was filed by the appellant for relief against the sale under the judgment in favor of the people. The act of the legislature passed upon the application of Hallenbeck was, on his part, a violation of the defeasance executed by him to Lee, the appellant. Hallenbeck was satisfied with the security given him by Lee, and Lee was fairly exonerated from the judgment in favor of the state. Hallenbeck made an improper use of this judgment. He should have paid it off according to his agreement, and not have enforced it against the lands upon which it was a lien. He accepted Lee's conveyance of the 32 acres as his indemnity, and he has not shown that this indemnity failed. Co-nine's judgment was never considered of any avail. If Hallenbeck had any right to sell under the judgment in favor of the state, it must either have been because the conveyance from Smith to Lee was fraudulent, or that the deed to him of the 32 acres was not effectual. The deed from Smith to Lee was given for an adequate consideration. The Virginia lands, a part of the consideration, can be located, as a survey has been made of them, which was recognized in Virginia. If the residue of the consideration was not paid it was satisfactorily secured. *No fraud was intended by Smith and Lee. All the debts of Smith were secured as far as was practicable. The decision of the replevin suit cannot affect the real property. The basis of the compromise of that suit was the stipulation of Hallenbeck.

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If, however, Smith did convey with intent to defraud his

creditors, such intent will not avoid the conveyance, if Lee was ignorant of the fraud. (*Jackson v. Terry*, 13 John. R. 473; *Sands v. Hildreth*, 14 John. R. 498.) And if both Smith and Lee combined in an attempt to defraud creditors, none but creditors can take advantage of the fraud. (*Anderson v. Roberts*, 18 Johns. R. 515. Hallenbeck is estopped from availing himself of the statute of frauds, in consequence of his having affirmed the conveyance by his acts. (*White v. Stringer*, 2 Levinz, 105; Rob. on Frau. Con. 162, 167.) The proceedings under the absconding debtor act against Lee were never effectual. No entry was ever made on the real property by the trustees, nor any possession taken by them. The attaching creditors subsequently released Lee from the debts, for which the attachment issued. The trustees having neglected during eight years to act are not now entitled to be made parties. If this ought to have been done, the respondents should have made them parties in their cross bill.

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J. L. Bronk, for the respondents:—The deed from Smith and wife to Lee, the appellant, was fraudulent and void, having been given with intent to defraud Smith's creditors. A relationship existed between the parties; suits were pending against Smith at the time of the conveyance, (*Deming v. Smith & Judson*, 3 John. Ch. R. 332,) and no consideration was paid by Lee for the same. The Virginia lands furnished no good consideration, as they cannot be located; and there is no proof of any real payments having been made by Lee to Smith. No change of possession accompanied the execution of the deed and bill of sale to Lee. This is a strong badge of fraud. If Smith attempted to defraud one creditor, any other creditor may take advantage of it and avoid the conveyance. (*Read v. Livingston*, 3 John. Ch. R. 501; *Jackson v. Seward*, 5 Cowen, 67 to 73.

*The title of Lee (if any) is in the trustees appointed under the absconding debtor act, (1 R. L. 157, 159.) The

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appointment of the trustees cannot be vacated, as the appellant has not made them parties. Trustees should always be made parties. (Cooper's Eq. Pl. 34; *Movan v. Hays*, 1 John. Ch. R. 389; *Osgood v. Franklin*, 2 id. 19; *Sells v. Hubbell*, 2 id. 394.)

Lee admitted Conine's title, by agreeing to take one under him. And Hallenbeck not being charged as trustee, no remedy can, in any way, be had against him. The act of the legislature was not only binding and valid, but equitable.

THE CHANCELLOR:—The first question presented in this case is whether the conveyance from Smith and wife to the appellant, in January, 1818, was a fair and *bona fide* conveyance, or was intended to defraud creditors, or hinder or delay the collection of their debts.

The suit of Conine was then pending, but could not be tried so as to have a judgment rendered therein previous to the May term. But the suit in behalf of the state, on the loan office bond, was in a situation that a judgment might be entered therein in a few days. Smith was also indebted to Losee and others. Under such circumstances he made a conveyance of all his property, both real and personal, to his father in law. And what did he get in exchange to pay his creditors, who were about to obtain judgments against him? He got \$4,000 in Virginia lands, which had been conveyed to Lee, twenty years before, but which he had never seen. It is true a regular paper title to this land is produced, under a location made in 1786. But every person at all acquainted with the location of Virginia and Kentucky land warrants is aware that it frequently happened that several holders of these warrants, located upon and obtained patents for the same tract, without knowing it had before been granted to others. A patent, under such circumstances, is scarcely *prima facie* evidence of title. And when we take into consideration the fact that no attempt has been made to take possession of the land under this

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title for more than forty years, it is hardly credible that the appellant still believes it to be a valid and *subsisting title, and that the lands are worth the price mentioned in the deed. But if the title had been known to the parties to be good, it is that kind of property which would be the least likely to enable a debtor in failing circumstances to raise money to pay his honest creditors. The Acorn note, for about \$600, which also formed a part of the alleged consideration of the deed, was afterwards collected by Lee; and the bond, which is said to have been given for the balance, is not recollected by the subscribing witness to the deed, and no body has ever seen it. In addition to this, the possession of the property was not actually changed, although it might have been nominally. On the whole I am perfectly satisfied, from the evidence, that the conveyance was fraudulent; and was intended not only to defeat the recovery of Conine's debt, but also to protect the property of Smith from the operation of the judgment which was then about to be obtained on the loan office bond. Although the state could not probably be defrauded, as Hallenbeck and the surety had sufficient property to pay the debt, yet as they both stood in the relation of sureties to Smith, in respect to that debt, the effect of the conveyance was to defraud them, by removing the property of the real debtor beyond the reach of the execution, and leaving it to be satisfied out of the property of his sureties.

That a fraudulent use was made of this conveyance as regards Hallenbeck, is also evident from the pleadings and proofs in this case. The whole amount due to this state was received and misapplied by Smith; and Hallenbeck and his surety were entitled to full indemnity from him. In the appellant's bill in this cause, he says that he agreed with Smith, as a part of the consideration of the conveyance of the farm, to pay and discharge the amount due to the state for which the suit was brought on the bond. If such an agreement was made, it was carefully concealed from the knowledge of Hallenbeck; and it appears from

1829. the testimony that Lee absolutely refused to become personally responsible therefor, and Hallenbeck was compelled to assume the payment of the whole amount himself, in order to obtain a mortgage upon a very small part of the farm for his indemnity. Even *that was no valid security, as the written defeasance was not acknowledged or recorded, and was left in the hands of Smith or Lee, so that Hallenbeck had no protection whatever against subsequent purchasers or incumbrancers.

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Although the finding of the jury upon the sheriff's inquest in August, 1818, as to the personal property which was conveyed simultaneously with the deed, and the more formal trial and verdict, which was given at the circuit in December, 1819, in the replevin suit for the same property, are not conclusive evidence of the fraudulent nature of this transaction; yet they are calculated to give me additional confidence as to the correctness of the conclusion at which I have arrived on this question from the pleadings and proofs before me in this cause. But the result of the replevin suit has an important bearing upon another point in this case.

It is insisted on the part of the appellant that as Hallenbeck took a deed from him for the thirty-two acres, he is estopped from setting up the fraud in the original conveyance. On the part of the defendants it is alleged that by the finding of the jury in the replevin suit, all parties became satisfied the conveyance of the first of January, 1818, could not be sustained; and that the legal title to the whole farm was vested in Conine, under the sale upon his execution; that in consequence thereof, the mortgage to Hallenbeck, and the agreement therein contained on his part, which had been made before the fraudulent nature of the original deed to Lee was known to him, were abandoned; and a new agreement was made for his indemnity. I think this allegation in the answer is abundantly established by the evidence in the case. There was no formal surrender of the deed and defeasance, but the recitals and stipulations

contained in the written agreement made between Lee and Conine, in December, 1819, are wholly inconsistent with the idea that the agreement between Lee and Hallenbeck, in May, 1818, was to remain in force. Lee treated with Conine upon the basis of the verdict which had been rendered two or three days before that time, by which the transactions of the first of January, 1818, were found to be fraudulent and void. He agreed *to become responsible to Conine for the whole amount of his debt and expenses, and to the attorneys for their costs and counsel fees. Conine on his part agreed that if the notes which were then given should be paid by Smith and Lee when the same fell due, and they should also secure Hallenbeck against the demand in favor of the state, he would convey the farm to Lee. This condition has never been complied with; and if the legal title to the farm is not in Hunter, under the sale upon the loan office execution, it is still in Conine. The release of all personal liability against Lee on the notes is not sufficient to authorize him to claim a conveyance under the agreement of December, 1819. That conveyance did not depend upon the personal responsibility of Lee. It was only to be made upon the payment of the whole amount of the notes by Smith and Lee. The principal part of these notes is still due from Smith, and Lee has no equitable claim to the land until the whole amount is paid. Conine is not a party to the suit, and no decree can be made affecting his rights. Hunter is not estopped from setting up an outstanding title in Conine. He did not go into possession under title derived from Lee, but in hostility to his claim. If he was in under the mortgage to Hallenbeck, it could not affect his right to set up an outstanding title in the residue of the farm beyond the thirty-two acres. And even if he was in possession of the thirty-two acres under the mortgage, the only right of Lee would be to redeem that part of the farm on payment of the amount secured by that mortgage and interest. But I have already showed that the mortgage security was considered as abandoned from

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the time of the compromise with Conine, and no person was ever in possession under the mortgage. The agreement of Conine recites that Smith was then residing on the farm.

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If the original deed to Lee was fraudulent, and the mortgage security to Hallenbeck was abandoned by the agreement of December, 1819, the appellant has no right to complain of the proceedings under the act for the relief of Hallenbeck, passed in April, 1819, unless he thinks proper to comply with the conditions of the contract with Conine, and to make his claim under the equity of that agreement. But *if he had all the proper parties before the court, and was willing to comply with those conditions, his right to the farm in the hands of Hunter would be extremely doubtful, especially after such a lapse of time.

At the time of the compromise, in December, 1819, the people had a judgment which was a lien on the farm, and was prior in point of time to that under which Conine had purchased. The only question which can possibly arise in this case, is whether Hallenbeck was so far bound by that agreement as to preclude him from taking advantage of the law which had been passed for his relief. Although a condition was inserted in that agreement for the benefit of Hallenbeck, he was not technically a party thereto, and had no personal claim against any one except Smith, who was insolvent, for the payment of the debt for which he was responsible. He had an equitable claim to have the judgment of the state satisfied out of the property of Smith, on which it was a prior lien, instead of its being satisfied out of his own property. The legislature, in passing the act, divested no legal or equitable rights, and did nothing more than a court of equity might have done under like circumstances. At the time Hallenbeck took the assignment under that act, Lee had left the state, and probably without ever intending to comply with the conditions of the contract with Conine. It therefore became a struggle between two *bona fide* creditors of Smith for a preference against the estate which had been fraudulently conveyed to Lee. In

this contest Smith took the side against Conine, and gave his assent to the issuing the execution, and released his claim to the surplus. At the sale under that execution the property was sold for much less than its real value; and Conine, in whom the legal title was then vested, had a right to redeem the property from this sale during the period of twelve months, and was also entitled to the surplus moneys which Smith released. Lee, who had contracted with Conine for the purchase of his right, might also, under the equity of the statute, have redeemed it from that sale. The property was in this situation when the proceedings were instituted against Lee as an absconding debtor. He had at that time an equitable interest *in the farm, subject to the payment of the notes to Conine and his attorneys, and the amount due on the bid. This right was attached by the sheriff, and passed to assignees, who were appointed in July, 1821. But as neither Conine or the trustees redeemed the premises from the sale, the whole title passed to Hallenbeck by the assignment of Brigham's bid, and the sheriff's deed in January, 1822. If this was a valid sale as against Conine and Lee, which I am inclined to think it was, the whole legal and equitable title to the farm is in Hunter, under this deed from Hallenbeck. If this sale should be set aside as inequitable, then the legal title is in Conine; and the trustees of Lee, if they have any right to the property, can only avail themselves of it by paying the full amount of the notes to Conine and his attorneys, together with the amount which Hallenbeck has been obliged to pay on account of Smith. But those claims against the property, if any such exist, cannot be settled in this suit, as neither the trustees or Conine are parties. By the 10th section of the act, (1 Rev. Laws, 159,) the trustees from the time of their appointment, became vested with all the estate of the absent debtor; and by the 26th section (1 Rev. Laws, 163) the appointment is made conclusive proof in all courts that the debtor therein named was at the time absent, absconding or concealed, within the meaning of the

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act; and that the appointment and proceedings previous thereto were regular. The surplus of the debtor's property, after payment of all his just debts, is to be refunded to him. The statute has prescribed the mode of notifying the creditors to exhibit their claims; and the debtor is not entitled to a restoration of the surplus of his estate until those directions have been complied with, or the creditors have had a chance to be heard by their trustees, and by a public notice under a decree of this court. A decree that the defendants in this cause account to Lee, would not protect them from similar proceedings at the suit of the trustees. He alleges in his bill that there are no other creditors; but the trustees have taken no steps to ascertain that fact, and it is impossible for the defendants to know whether that allegation is true or not. The proper course for the debtor to obtain a surplus *to which he might be entitled in such a case, would be to make the trustees parties; and if they had not already given the requisite notices to the creditors to exhibit their claims, notice might be given, under the decree of the court, in the usual manner of calling in creditors under a decree.

I am perfectly satisfied that this suit was improperly brought by the appellant; that no decree could be made in his favor against the defendants, and that the conveyance of the 1st of January, 1818, was fraudulent and void, not only as against Conine, but as against Hallenbeck, and the same ought to be set aside. The decree of the equity court is therefore affirmed, with costs; and the further proceedings to carry the same into effect may be had in this court.

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FOSTER AND BOUCK, EXECUTORS, &C. v. WILBER AND
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When executors or administrators are cited to account before a surrogate, it is the duty of the complainants, when required, to file a written allegation or libel stating the substance of their claims against the defendants.

The defendants may call on the surrogate to reject the allegation for insufficiency, or they may take issue upon the facts propounded, or put in a counter allegation in the nature of a plea in bar.

The surrogate before whom the will was proved, or by whom administration was granted, has power upon the application of the legatees or next of kin, to compel executors as well as administrators to account and to distribute the personal estate according to law or the directions of the testator.[1]

No surrogate can call executors or administrators to account, except where probate of the will or letters of administration were granted by him.

Whether a surrogate can compel an account from the personal representatives of a deceased executor or administrator, although probate or administration of both estates were granted by him, unless some portion of the first estate actually came to the hands of such representatives? *Quere.*

Where, to determine the liability of parties, it is necessary to require the accounts of several estates, it would seem that the Court of Chancery alone has jurisdiction.

ABOUT twenty years since, John Wilber, of the county of Otsego, made his will, and appointed his son John, and A. Olmstead, D. Fuller and T. Murphy his executors. The testator died soon after, and the will was proved by the executors *before the surrogate of Otsego. Fuller died in 1815, intestate, and his widow administered on his estate. Murphy resided in the county of Schoharie, and the only part of the estate which ever came to his hands, was a debt due from D. Olmstead; which he paid over to his co-executors, in 1813, and took their receipt for the same in full.

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[1] 2 R. S. (4th ed.) 277, sec. 57; see also *Dakin v. Demming*, 6 Paige, 95; *Stagg v. Jackson*, 1 Comst. 206; *Westervelt v. Greag*, 1 Barb. Ch. 469; *Grat-acap v. Phye*, id. 485; *Stagg v. Jackson*, 2 id. 87; *Smith v. Van Kuren*, id. 473, 475.

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Murphy died in Schoharie in 1817, and the appellants, his executors, proved his will before the surrogate of that county. In 1827, N. Wilber, one of the sons of John Wilber, and D. Olmstead, the assignee of another son, cited the surviving executors of John Wilber, the administratrix of Fuller, and the executors of Murphy, to appear before the surrogate of Otsego County to render an account of the execution of the will of John Wilber. The citation was served on one of the appellants only. When he appeared before the surrogate he objected to any further proceedings in the matter until his co-executor was cited. But the objection was overruled. Various other objections were also taken by the appellant who was cited. In December, 1827, the surrogate pronounced final sentence in the cause; by which, among other things, he declared and decreed that J. Wilber, Jr., one of the surviving executors of his father, the administratrix of Fuller, and the executors of Murphy were to be charged with the sum of \$831 91, with interest thereon from the first of July, 1811; that being the amount of the Olmstead debt, received by Murphy, and paid by him over to his co-executors. And the surrogate ordered the defendants to pay over one-fourth of that amount, including interest, being \$445 76, to D. Olmstead as the assignee of G. Wilber; and also to pay into court \$62 10, on account of the costs of the suit. From this sentence and decree of the surrogate the executors of Murphy appealed to this court.

J. I. Danforth and *A. Van Vechten*, for appellants:—The decree of the surrogate is erroneous and ought to be reversed. Both the executors of Murphy should have been cited before the surrogate; and also the residuary legatees of John Wilber. There were no pleadings before the surrogate. The complainants should have filed a written allegation of their claim against the defendants. The executors of Murphy *are not liable for the money received by their testator as executor of J. Wilber, and paid over by

him to his co-executors. Murphy reposed only a necessary confidence in those persons in whom the testator had placed equal confidence. (*Balchen v. Scott*, 2 Ves. jun. 678; *Bacon v. Bacon*, 5 Ves. 831.) The executors of Murphy cannot be bound after such a lapse of time to make out a strict discharge as to the moneys received by their testator as the executor of Wilber. There is a distinction between the claims of legatees and creditors upon executors. (*Churchill v. Lady Hobson*, 1 Pr. Wms. 242, 243.) The surrogate of Otsego had no jurisdiction over the appellants, they being executors of a will made and proved in Schoharie. A case like this is only cognizable in Chancery. The surrogate had no power to decree the payment of costs to himself. The claim here of one brother is barred by the statute of limitations. (*Kane v. Bloodgood*, 7 John. Ch. R. 90.)

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W. A. Seelye, for respondents:—The appellants are bound to give a legal account of the money received by Murphy their testator. The surrogate of one county has the power to call to account an executor in another county, provided the will is proved before the surrogate directing the account. The payment by Murphy to his co-executors was not a good discharge as to him. (*Mumford v. Murray*, 6 John. Ch. R. 1; *Monell v. Monell*, 5 John. Ch. R. 283, 294; *Sadler v. Hobbs*, 2 Brown's Ch. Cas. 114.) The appellants are liable to the payment of interest. (*Glen v. Fisher*, 6 John. Ch. R. 33; *Mumford v. Murray*, id. 17; *Green v. Winter*, 1 John. Ch. R. 27; *Manning v. Manning*, 1 id. 527.) Advantage cannot now be taken of the statute of limitations, as it was not pleaded before the surrogate; and there being a trust in this case prevents the statute operating as a bar. (*Goodrich v. Pendleton*, 3 John. Ch. R. 390; *Cooper v. Murray*, 5 John. Ch. R. 622; *Kane v. Bloodgood*, 7 John. Ch. R. 127; *Hammond v. Huntley*, 4 Cowen, 494.)

*THE CHANCELLOR:—On the argument of this cause,

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the counsel for the appellants raised a great variety of objections to the proceedings before the surrogate. Some of these objections relate to the formality of the proceedings merely; but many of them go to the jurisdiction of the court, and to the merits of the final sentence and decree pronounced by him. As to matters of form, the whole proceedings appear to have been very loose and irregular. The promoters of the suit were called upon to state the grounds of their claim against the executors of Murphy; but it was not done. It was their duty, when called on for that purpose, to file a written allegation or libel, propounding or stating the substance of their claim against the defendants respectively, and the nature and grounds thereof. If this allegation was insufficient, and showed no grounds for proceeding against the defendants, the court might be called upon to reject it; or they might take issue on the facts propounded; or put in a counter allegation in the nature of a plea in bar. Until some issue was joined in the cause, neither party could be prepared to go into the examination of testimony.

It was objected on the argument that the power of the surrogate to compel an account was confined to administrators, and did not extend to executors. Such undoubtedly was the ecclesiastical law of England at the time of the first settlement of this country, and as such was brought hither by our ancestors. And I have not been able to find that it was altered in this state previous to the revolution. In the case of *Sparrow v. Norfolk*, in the 15th year of James the 1st, (Noyes' Rep. 28, Godolph. Eccl. L. 116,) an executor being cited to account before the ordinary, a prohibition was granted, on the ground that the ecclesiastical courts had no jurisdiction in such cases; but it was admitted they had the power to compel such an account by an administrators. That such was the law in England, may also be fairly inferred from the statutes 22 and 23 Charles 2, ch. 10, and 1 James 2, ch. 17. But soon after the revolution provisions were introduced into the statutes

of this state which evidently show an intention on the part of the legislature to extend the power of the Court of Probates so far as to enable them to call *executors to account in certain cases. That power has in a subsequent revision of the statutes been extended to the surrogate who grants probate of the will, or letters of administration on the estate. The first part of the eleventh section of the revised act of the 8th of April, 1813, (1 Rev. Laws, 448,) is undoubtedly taken from the statute 22 and 23 Charles 2, ch. 10, which gives express power to the ecclesiastical courts to call administrators to account. But the latter clause of the section, which authorizes the Court of Probates or surrogate to hear and determine all causes touching any legacy or bequest in any last will or testament, payable or coming out of the personal estate of the testator, and to decree and compel payment thereof, is not found in the British statute. But it was introduced into the revision of our laws in 1787. (2 Jon. & Var. ed. of Laws, 71.) The power to call the executor as well as the administrator to account before the Court of Probates or surrogate, is also recognized in the 3d section of the act of the 6th of April, 1813. (1 Rev. Laws, 311.) This section appears to have been taken from the 6th section of the statute 1 James 2, ch. 17, which extends to administrators only. But in our revision of 1787, it is found, as in the act of 1813, applicable to executors as well as to administrators. The conclusion to which I have arrived on this point is, that in this state, on the application of the legatees or next of kin, the surrogate before whom the will is proved, or by whom administration is granted, may compel the executor or administrator to account, and distribute the personal estate of the testator or intestate, according to law, or agreeably to the terms of the will.

There is, however, a difficulty in this case as to the jurisdiction of the surrogate, which is insurmountable. The appellants were not executors of Wilber, whose legatees were seeking for an account of his estate; neither were they bound to account to the surrogate of Otsego. By

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the act of the 8th of April, 1813, (1 Rev. Laws, 445,) the exclusive power to take proof of the will, or grant administration of the estate, is given to the surrogate of the county of which the testator or intestate was an inhabitant at the time of his death; *and the ninth section of the same act authorizes any such surrogate to call the administrator, &c., to account. It certainly never was the intention of the legislature to authorize a surrogate to exercise any control or authority over executors or administrators, except as to those who had made proof of the will or taken out administration before him. No such power was ever exercised by any ecclesiastical court in England; and there is nothing in our laws conferring any such jurisdiction here. It is very doubtful whether any surrogate has the right to compel the representatives of a deceased executor or administrator to account for the estate which came to the hands of such executor or administrator, even if probate or administration as to both estates were granted by him, unless some portion of the first estate actually came to the hands of such representatives. (1 Addams' Rep. 153.) In this case, some of the executors of Wilber survived Murphy; the appellants, therefore, are not the executors of Wilber, and have nothing to do with his estate. If their testator had made himself liable by maladministration, they are liable as debtors to that estate, to the amount of the assets of Murphy in their hands, to be paid in a due course of administration. Although Murphy died solvent, it does not follow that his executors have sufficient assets in their hands to pay all his debts. This case is a strong elucidation of the impropriety of giving to the surrogate such a power. In order to determine the liability of the several parties cited before the surrogate, and to make a final settlement of the matter, it would require the accounts of three different estates to be taken. If the appellants are responsible to the heirs of Wilber in any event, it is clear that they ought not to be compelled to pay until the remedy of those heirs has been exhausted against the

surviving executor, and the estate of Fuller. And yet the decree of the surrogate is joint as well as personal against the surviving executor of Wilber, the administratrix of Fuller, and one of the executors of Murphy. It would seem that in such a case the Court of Chancery alone was competent to make a decree settling all these conflicting rights so as to do justice between the parties. It is certain that in this case the surrogate of Otsego had no jurisdiction *to make this decree against the appellants who had taken out probate in the county of Schoharie.

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In addition to the want of jurisdiction over these appellants and the estate of Murphy, so far as I can understand this case from the informal proceedings which have been sent up on this appeal, the decree of the surrogate cannot be sustained on the merits. By the will of Wilber the Olmstead debt was specifically appropriated to pay the demand due to Peter Smith, and all other debts of the testator; and the overplus only, if any there should be, was given to the four eldest sons. As early as 1813, Murphy received the Olmstead debt, and settled for the same with the acting executors and took their receipt. If either of those executors or Murphy have paid any debts of the estate, he had a right to insist that it should be deducted from the moneys paid over by him. As that was the fund appropriated for the payment of all the debts, whatever payments have been made by those who are accountable for that fund must be deducted; and the executors of Murphy can in no case be made answerable for any thing more than the surplus. It appears from the testimony that Murphy settled the Smith debt. If he settled it out of the proceeds of real estate when there was a special fund in his hands for the purpose, he may be liable to the owners of that real estate, and was entitled to retain an equal amount out of the fund to satisfy their claim. John Wilber, Jr., who received the money from Murphy, in 1813, also paid above \$250 towards the debts for which that fund was particularly appropriated.

1829. And yet the appellants are charged with the whole amount of that fund, with interest from 1811.

Morgan
v.
Schermerhorn. The sentence and decree of the surrogate so far as it affects the rights of the appellants or either of them must be reversed. It is undoubtedly erroneous as to the administratrix of Fuller; but as she has not appealed, this court can make no order for her relief.

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*MORGAN v. SCHERMERHORN.

Where M. being in embarrassed circumstances and pressed with executions against him, applied to S. for a loan of \$800, and S. refused the loan unless M. would consent to purchase from him 124 acres of wild land at \$550, which was much above its real value, and M. finally accepted this proposition and gave S. a bond and mortgage for \$1,350, payable in 12 equal annual instalments, with annual interest, it was held that this loan was usurious.

A party who comes to Chancery for relief against an usurious contract must pay or offer to pay the amount actually due, before he will be entitled to an injunction to restrain proceedings at law, or to an answer as to the alleged usury.[1]

But if the defendant puts in his answer without making this objection, the court will not afterwards dissolve the injunction, if the complainant is still willing to pay the amount.

August 4th. THE complainant being embarrassed with debts and executions, applied to the defendant for a loan of \$800. The defendant refused to lend him the money unless he would consent to purchase from him 124 acres of wild land, in the north part of Montgomery County, for the sum of \$550. The complainant at first hesitated, but finally consented to

[1] Now by statute, see 2 R. S. (4th ed.) 182, sec. 13. A borrower seeking relief or discovery, on account of usury, need not pay back, or offer to pay back any interest or principal to the lender. See *Fulton Bank v. Beach*, ante, 429 n.; *Livingston v. Harris*, 3 Paige, 528; S. C., 11 Wen. 329: see also *Rexford v. Widger*, id. 181.

take the loan on these terms. He gave to the defendant a bond and mortgage for \$1,850, payable in twelve yearly instalments, with interest to be paid annually. In 1828, the defendant commenced a suit against the complainant upon the bond, and also instituted proceedings of foreclosure upon the mortgage under the statute. The complainant applied to the defendant by his attorney, and offered to pay or secure the payment of the sum of \$800, with compound interest from the time of the loan, and to re-convey the 124 acres of wild land, free from taxes and incumbrances. The defendant declined this proposition, but offered to deduct \$200, if the complainant would pay him the residue of the bond and mortgage. The complainant repeated his offer in the bill filed in this cause, and obtained an injunction restraining the proceedings at law upon the mortgage. The answer of the defendant having been put in, he now moved to dissolve the injunction.

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Schermmerhorn.

*A. Stewart for the complainant :—This is a clear case of usury. The complainant being embarrassed with debt, was compelled to purchase from the defendant 124 acres of land of no value, at the sum of \$550, in order to obtain from him a loan of \$800. In *Eagleson v. Shotwell*, (1 John. Ch. R. 536,) which was a case like the present, the court granted relief to the debtor. It is a well settled rule, where the lender imposes upon the borrower the condition of taking some other thing above its value with the money loaned against the wishes of the borrower, but who submits to the condition from his necessities, that the same is usury both at law and equity. (*Rose v. Dickson*, 7 John. R. 196; *Stuart v. The Mechanics' and Farmers' Bank*, 19 John. R. 509.) If the debtor has offered to pay the sum actually due, which has been refused, the court will not require such sum to be brought into court, but will reduce the security to the sum really due. (*Eagleson v. Shotwell*, 1 John. Ch. R. 536; *Fanning v. Dunham*, 5 John. Ch. R. 144; *Thompson v. Berry*, 8 John. Ch. R. 398.) Even if

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1829. there has been merely a mistake or ignorance as to the value of land sold, and no fraud has been shown, Chancery will grant relief. (*Bingham v. Bingham*, 1 Ves. sen. 126, per Ld. Hardwicke; 1 Pr. Wms. 355.)

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L. Beardsley for the defendant:—The contract in this case was not usurious. The defendant denies all intention to take usury; his only object was to dispose of his land at a fair price. Both parties at the time supposed the land worth the sum agreed to be paid for it. To constitute usury there must be a corrupt agreement. (*Nourse v. Prime*, 7 John. Ch. R. 77; *New York Fire Ins. Co. v. Ely*, 2 Cowen's R. 678.) It is not denied that any device with a view of securing more than the legal interest is usury. (*Rose v. Dickson*, 7 John. Ch. R. 196; *Eagleson v. Shotwell*, 1 John. Ch. R. 536; *Dunham v. Gould*, 16 John. R. 367.) If the sale of property at the time of making a loan of money is *bona fide*, the contract is not usurious. To make it usurious a corrupt intention is necessary. (*Clason v. Morris et al.*, 10 John. R. 525. The court will not presume, the contract *usurious without proof. (*McGuire v. Parker's Exrs.*, 1 Wash. R. 268.) A *bona fide* sale of property at however high a price, cannot be usury. (*Skipwith v. Gibson & Jefferson*, 4 Hen. & Munf. 490; *Greenhow's Administratrix v. Harris*, 6 Munf. 472; *Bull v. Douglass*, 4 Munf. 303; *West v. Belcher*, 5 Munf. 187.) But if the lender impose upon the borrower goods, in part or in whole, at a higher value than they are worth, it is usury. (*Stuart v. Farmers' and Mechanics' Bank*, 19 John. R. 496, 508, 509; *Lowe v. Walter*, Doug. 708.) Even if the transaction was usurious, the injunction ought not to be sustained, because the complainant has not brought the money actually lent with interest into court; (*Rogers v. Rathbun*, 1 John. Ch. R. 367; (*Tupper v. Powell*, id. 439; *Fanning v. Dunham*, 5 id. 122.)

THE CHANCELLOR:—The objection that the complainant has not brought into court the amount admitted to be due

with legal interest, cannot be received in this stage of the cause. As a general rule a party who comes here to seek relief against an usurious contract, must pay or offer to pay the amount actually due, before he will be entitled to an injunction, or to answer as to the alleged usury. But if he answers the bill without making any objection on that ground, the court will not afterwards dissolve the injunction, if it appears there is usury, and if the defendant is then willing to pay the sum really due. If a party comes here to seek equity, the court will compel him to do equity. In this case the complainant offered to pay the whole amount loaned, with compound interest; and the defendant refused to receive it. Under such circumstances, it was not necessary to make a formal tender of the money. The same offer is repeated in the bill, and the court has power to compel him to make it good, whenever the defendant consents to accept of those terms. The actual payment of the money, under such circumstances, was not necessary.

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The only question in this cause, therefore, is, whether the defendant is entitled to hold this mortgage for its whole nominal amount. It is alleged in the bill that this land, which was in a measure forced upon the complainant at nearly four and a *half dollars per acre, was not in fact worth one at the time of the sale. The answer to this is, that the defendant knows nothing of its value, except what is contained in his father's letter, &c., and he fixed it at a price not exceeding \$3 per acre. If the defendant knew, or had reason to believe, he was getting more for his land than any one would be willing to give him for it unconnected with a loan of money, he was in fact selling it for a price above its actual worth, whatever he might have considered its nominal value. From the answer in this case, no one can doubt that the necessities of the complainant induced him, for the sake of obtaining the loan, to give for this land a sum much beyond what it was actually worth to him. And the defendant, by this device, did

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1829. in fact obtain more than seven per cent. advantage from
 Whitney the loan of his money. The statute cannot be evaded in
 v. this way ; and no device of this kind can be permitted to
 Mayor, &c. of avail the lender, without in effect repealing the laws against
 New York. usury. As to the policy of those laws the court have
 nothing to do. So long as the legislature thinks proper to
 continue them on the statute book, it is our duty to see
 them faithfully executed. It might perhaps be beneficial
 to the borrower, in some cases, if he were permitted to stip-
 ulate directly to allow a premium above the legal rate of
 interest ; but some limitation is absolutely necessary to
 protect the necessitous against their own improvidence,
 and the cupidity of avarice.

The motion to dissolve the injunction must be denied
 with costs, unless the defendant consents to receive the
 money loaned, and legal interest, together with a re-con-
 veyance of the land ; and to pay the costs already accrued
 in this suit. If he consents to those terms, the complainant
 must pay the amount due and execute the conveyance
 within sixty days after notice of such acceptance, or the in-
 junction must be dissolved.

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*WHITNEY v. THE MAYOR, ALDERMEN, &c. OF THE CITY
 OF NEW YORK.

The power to review and correct the errors, abuses and mistakes of public
 officers and of inferior or subordinate jurisdictions, belongs exclusively to
 the Supreme Court.

Illegality in the proceedings upon assessments for the purpose of regulating
 and improving streets in the city of New York, may be corrected by a *cer-*
tiorari to the Supreme Court.

A motion to dismiss a bill for want of prosecution, can only be made where
 there are other defendants against whom the cause is not in readiness for a
 hearing in consequence of the neglect of the complainant to expedite the
 proceedings against them.

Where both parties have the right to bring the cause to a hearing, a motion to dismiss the bill for want of prosecution is irregular.

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Whitney

v.

Mayor, &c. of
New York.

August 4th.

THE bill in this cause was filed to restrain the defendants from selling two lots of the complainants, which had been assessed for a share of the expenses of regulating and improving Lombardy street, between Clinton and Walnut streets, in the city of New York, under the 175th section of the act to reduce several laws relating particularly to the city of New York, into one act. (2 Rev. Laws, 407.) The alleged irregularity in the proceedings was that the improvement in the street had been made before the assessment for that purpose, and before the entry of the ordinance authorizing the assessment. The assessment was made and confirmed by the Common Council in 1821.

M. Ushoeffter, for the defendants, on the bill and answer moved for a dissolution of the injunction, and that the bill be dismissed with costs.

D. S. Jones, for the complainant.

THE CHANCELLOR:—It is not necessary for me to express an opinion whether there is any legal objection to the assessment against the complainant's property. If it is illegal, he has a full and perfect remedy at law, and this is not the proper tribunal for him to apply to for redress. In *Mooers v. *Smedley*, (6 John. Ch. Rep. 28,) this court decided that the review and correction of errors, abuses and mistakes in the exercise of the powers of inferior and subordinate jurisdictions, and in the official acts of public officers, belonged exclusively to the Supreme Court. That such a power exists in that court has been repeatedly recognized by the judges thereof. (2 Caines' Rep. 169; 16 John. Rep. 50; 1 Wendell, 288.) And that the complainant may correct any illegal proceedings under the 175th section of this act, by a *certiorari*, was expressly decided by that court, in

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v.
Williams.

the case of *Le Roy and others v. The Mayor, &c.* (20 John. Rep. 430.) The injunction must therefore be dissolved. The application to dismiss the bill for want of prosecution is not the regular mode of getting rid of the suit, under the rule of June, 1828. The proper course is for the defendant to set it down on bill and answer, if the complainant neglects to file a replication. The motion to dismiss is only allowed where there other defendants, against whom the cause is not in readiness for hearing, in consequence of the neglect of the complainant to expedite the proceedings against them. By the English practice, the motion to dismiss was merely for the purpose of expediting the proceedings of the complainant; and there is no ground for such an application on the part of the defendant, where either party is at liberty to proceed in the cause. At law, if the plaintiff neglects to bring the cause to trial, judgment as in case of non-suit may be granted. But the defendant cannot move for such a judgment in replevin, because he has an equal right with the plaintiff to carry down the cause for trial.

The motion to dismiss the bill is denied.

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*SCRIBNER v. WILLIAMS AND OTHERS.

Appellate courts which proceed according to the course of the civil law may allow the parties to introduce new allegations or further proofs.

But it is not a matter of course to receive further proof upon an appeal.

If the appellant wishes to offer new evidence, he should in his petition of appeal ask leave to produce further proofs, and state his excuse for not producing such evidence in the court below.

Upon an appeal from the sentence of a surrogate disallowing a will, this court will not change the appellant, he being the executor who propounded the will before the surrogate, by substituting the legatee, in order to give the legatee the benefit of the executor's testimony in favor of the will.

August 4th.

THE appellant applied to the surrogate of Westchester for probate of the will of Martha Williams deceased; and

the same being contested, the surrogate pronounced against the validity of the will. From this sentence of the surrogate the executor appealed to this court.

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Williams.

A. Ward now presented a petition in behalf of the appellant, and the husband of the principal legatee named in the will, praying that the name of the latter might be substituted as appellant; that the executor might be permitted to renounce the execution of the will, so as to become an admissible witness on the appeal; and that administration with the will annexed might be granted. To show that further proof could be introduced on the appeal, the counsel cited Consetio's Pr. of Eccl. Courts, 116.

Jas. Smith, for the respondents, insisted that the appellant could not be changed so as to make the executor a competent witness.

THE CHANCELLOR:—There is no doubt of the power of appellate courts, proceeding according to the course of the civil law, to allow the parties to introduce new allegations or further proofs. Such is the settled practice of the ecclesiastical courts in England, and of the admiralty courts in this country. But from the organization of the Court of Errors, it is doubtful whether any such right exists on appeals from the sentences or decrees of this court in testamentary causes. *In those courts where the right does exist, it is not a matter of course to allow the parties to produce further proofs. (The Euphrates, 8 Cranch, 385; The Pizarro, 2 Wheat. 227; The St. Lawrence, 8 Cranch, 434.) It would not be a safe or convenient rule to allow parties who have had the benefit of plenary proof before the judge *a quo*, to introduce new proofs to the same point before the judge *ad quem*, without any excuse for not having produced the evidence in the court below. If the appellant wishes to have the facts reviewed on new evidence in the appellate court, it would be proper for him, in his

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petition of appeal, to ask leave to produce further proofs, and state his excuse for not having produced them before.

But a more serious difficulty is presented in this case. The witness that the petitioners now wish to have examined is the sole appellant, and for aught that appears was the only party who promoted the suit before the surrogate. He now asks to abandon his appeal and renounce the execution of the paper propounded as a will, for the purpose of giving the legatee the benefit of his testimony. Without expressing any opinion as to the effect of the sentence of the surrogate on the rights of the legatee, or whether he is in a situation to appeal from that sentence, I am satisfied the relief prayed for in this case ought not to be granted.

Petition dismissed.

WHITE v. MOORE AND OTHERS.

A deed absolute on its face, if intended only as a mortgage or security for the payment of money, whether accompanied by a written defeasance or not must be recorded as a mortgage in order to protect the holder against a subsequent *bona fide* mortgagee or purchaser of the premises.

If no written defeasance was executed, the holder of the mortgage may comply with the requirement of the statute at any time afterwards by executing a defeasance according to the terms agreed upon by the parties, and then recording both instruments together as a mortgage.

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BLAUSIUS MOORE was the owner of certain premises, which were mortgaged to the complainant in November, 1825. *Moore was indebted to the Hudson Insurance Company in about the sum of \$4,000; and in order to secure this amount, among other securities, he gave to Mark Spencer, the president of that company, an absolute deed of five-sixths of the mortgaged premises. This deed was dated in 1826, but left blank as to the day and month. It

was actually executed in April of that year, and was intended merely as a mortgage, although there was no written defeasance. On the 19th of July, 1826, the Hudson Insurance Company assigned the deed received from Moore, together with a large amount of other securities, to secure a debt of \$700,000 due to the Fulton Bank. On the fifth of August, 1826, the deed to Spencer was recorded in the book of deeds in the city of New York, but has never been registered or recorded there as a mortgage. About the time Spencer conveyed the premises to the Fulton Bank; this and other securities were given to the bank in absolute payment of a draft of \$40,000 drawn by Spencer, and passed to the bank by the insurance company. The deed from Spencer was also recorded on the 5th of August, 1826. At the time of the execution of the deed to Spencer, the premises were subject to a mortgage to Kain. On the 9th of August, Mrs. Healy purchased the premises of Moore for \$4,000, without any knowledge of the existence of the conveyance to Spencer. She paid \$3,000, and reserved the residue until the Kain mortgage should be cancelled. On the 12th of September, Moore produced a certificate of the discharge of the Kain mortgage, and received from Mrs. Healy the balance of the purchase-money. The premises were sold under a decree in this cause, and produced a surplus of \$1,257 74. A reference was made to a master to ascertain the facts, and report which of the defendants was entitled to the surplus. The master reported that it belonged to Mrs. Healey.

H. W. Warner, for S. A. Healy and wife :—The surplus funds in court belong to Healy and wife. The conveyance by Moore to Mark Spencer, which was assigned to the Fulton Bank, although absolute in its terms was intended only as a mortgage. It being a mortgage and not having been *recorded in the book of mortgages, the deed to Mrs. Healy takes priority over it. (1 R. L. 372, sec. 2, 3.) That the deed to Spencer was intended as a mortgage, may be shown by parol. (*Marks v. Pell*, 1 John. Ch. R. 594;

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James v. Johnson, 6 John. Ch. R. 417; *Slee v. Manhattan Company*, *ante*, p. 38.) The Fulton Bank received the deed from Spencer upon the same terms it was held by him, and acquired no greater rights than he possessed, and they had notice of all the circumstances under which it was given. (*Coddington v. Bay*, 20 John. R. 637.)

J. Hoyt, for the Fulton Bank, contended that the act concerning mortgages, contemplated only such defeasances to deeds as were reduced to writing; and that unless the defeasance was in writing, it was not necessary to cause the deed to be recorded in the book of mortgages. He also insisted that a person taking without notice, would be protected although he took from one who had notice. (*Jackson v. Given*, 8 John. R. 187; *Murray v. Ballou*, 1 John. Ch. R. 573; Jacob's Law Dic. tit. *Defeasance*.) And that Mrs. Healy had no other or greater equities than her grantor.

THE CHANCELLOR:—The right of the bank to the surplus produced on the sale of the mortgaged premises, depends upon the question whether the absolute deed given to Spencer, but which was in fact nothing but a mortgage, ought to have been registered or recorded as a mortgage. There is no pretence that Mrs. Healy knew any thing of it at the time of her purchase, although it was recorded as a deed some days previous.[1]

The second section of the act concerning mortgages (1 Rev. Laws, 373) provides, that no mortgage, nor any deed, conveyance or writing in the nature of a mortgage, shall defeat or prejudice the title or interest of any *bona fide* purchaser of any lands, tenements or hereditaments, unless the same shall have been duly registered, in the manner prescribed in that act. And the next section provides, that if there is a separate written defeasance, that shall also be recorded, in order to protect the instrument as a mortgage.

[1] 2 R. S. (4th ed.) 162, sec. 3.

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v.
Moore.

The *object of this statute undoubtedly was to require every deed or instrument which was in fact only a mortgage, to be recorded. If the construction of this statute was now for the first time to be settled, there might be a possible doubt whether the second section was so worded as to reach instruments which did not on their face purport to be mortgages, or conveyances in the nature of mortgages. But after the decisions of this court, sanctioned as they have been by the court of *dernier resort*, the construction of the statute is no longer to be questioned. In *Day v. Dunham*, (2 John. Ch. R. 188,) Chancellor Kent held, that a deed absolute on its face, but intended only as a security by way of mortgage, must be recorded as a mortgage, to protect the property against a *bona fide* purchaser; and that a constructive notice, arising from its being recorded as a deed was not sufficient. It is true in that case there was a written defeasance; but it was not executed until six months after the recording of the absolute deed, and long after the conveyance to the adverse party. It therefore could not have altered his rights if the defeasance had continued in parol. If the deed and defeasance had been recorded together as a mortgage the moment the defeasance was executed, it would not have protected the property against the intermediate conveyance. The decree in that cause was afterwards reversed in the Court of Errors, on the ground that the intermediate purchaser had actual notice, but the decision upon the point now under consideration was deemed correct. (15 John. R. 555.) The same question came before this court in *James v. Johnson & Morey*, (6 John. Ch. R. 417,) where there was no written defeasance, and was decided in the same way. When that case afterwards came before the Court of Errors, (2 Cowen's R. 247,) the present chief justice examined that question and concurred in the construction of the statute given by Chancellor Kent. And the correctness of that construction was not questioned by any member of the court.

There can be no hardship or injustice in such a construc-

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tion; but on the contrary, it will more effectually carry into effect the intention of the legislature, and prevent fraudulent conveyances, and secret trusts. If a conveyance is intended *only as a mortgage, there can be no good reason why the terms on which it is to be defeasible should not appear on its face. If, through inadvertence, it is taken as an absolute deed, the holder may comply with the terms of the statute, by making a written defeasance, specifying the conditions on which it was intended to be given, and recording both together in the book of mortgages. If he does this before the rights of any third party have intervened, he will be protected. And if he neglects it, he will only be in the same situation of every other mortgagee who neglects to have his security recorded.

Having arrived at the conclusion that by the conveyance to Mrs. Healy, she took the property discharged of the mortgage to Spencer, it cannot be necessary to examine the other question raised in this cause. If her conveyance was good against the original mortgagee, it was also good against the *bona fide* assignees of the unregistered mortgage, who took it merely as security for an antecedent debt.

The whole of the surplus moneys must be paid over to Healy and his wife.

SPENCER v. VAN DUZEN AND JONES.

If the defendant in his answer sets up a distinct matter by way of avoidance, which is not called for by the bill, the same, if irrelevant or immaterial, may be excepted to for impertinence, or the complainant may have the benefit of the objection upon the hearing.

If the complainant wishes to compel the defendant to state the new matter set up by way of defence with more particularity, he should amend his bill and state the matter by way of pretences, and call upon the defendant to answer as to the particulars.

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THIS cause was heard on exceptions to a master's report on exceptions to the answer of Van Duzen for insufficiency.

The master reported the answer insufficient in the matter of the 1st, 2d, 10th, 11th and 12th exceptions. The report was excepted to in these particulars; and the exceptions were submitted without argument. The facts sufficiently appear in the opinion of the Chancellor.

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Van Dusen.

**J. Hoyt*, for complainant.

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D. B. Talmadge, for defendant.

THE CHANCELLOR :—The first and second exceptions to the answer were promptly allowed, for the reasons given by the master.

The tenth exception appears to have been improperly allowed. The defendant says, that in a certain conversation between him and the complainant, the latter agreed to receive his note in payment of the loan of \$3,000, and instructed his partner to receive the same, and execute a release, which was done accordingly on the 30th of September, 1826. The master has declared the answer insufficient, because the defendant does not state the particular day on which this conversation took place. I cannot see how the time can possibly be material. It is stated to have been between the execution of the mortgage to Jones and the giving of the deed. This is all that appears material as to time. There is nothing in the bill calling for the time or particulars of this conversation. This exception to the answer should have been overruled.

The eleventh and twelfth exceptions ought also to have been disallowed. The part of the answer to which these exceptions are taken is no way responsive to the bill, and was not called for by the complainant. It relates to a distinct claim set up on the part of the defendant by way of set-off. If the defendant sets up a distinct matter by way of avoidance, and which is not called for by the bill, the answer cannot be excepted to for insufficiency. If the fact stated

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 Marvin.

is wholly immaterial, the answer may be excepted to for impertinence, or the complainant will have the benefit of his objection on the hearing. (*Clissold v. Powell*, 2 Madd. Ch. 355.) If the complainant wishes to have the details of any new matter set up by way of defence, he should amend his bill and state the matter by way of pretences, and call upon the defendant to answer as to the particulars thereof.

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The two first exceptions to the master's report are overruled, and the three last are allowed. The costs to which the parties are entitled will be fairly off set by allowing none to either party on these exceptions, or on the original exceptions to the answer. The defendant must put in a further answer to the two first exceptions in twenty days, unless the complainant amends his bill within ten days; in which case the defendant is to have forty days after the amendments are served to answer the amendments and exceptions together.

THE MERCHANTS' INSURANCE COMPANY v. MARVIN AND OTHERS.

Where the rights of the several defendants are truly stated in a bill of foreclosure, it is not necessary for them to appear and answer to protect their rights.

In such a case, where the mortgagor paid the complainant's debt and costs before any decree in the cause, the complainants were permitted to discontinue without paying the costs of junior incumbrancers who had unnecessarily appeared and answered.

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THE bill in this cause was filed to foreclose a mortgage given to the complainants. The mortgagor and some junior incumbrancers were made defendants. Some of the junior incumbrancers appeared and answered; but before any decree was made in this cause, the mortgagor paid to the complainants the amount due them and costs. The junior incumbrancers who have answered now claim the

right to have the suit continued to enable them to obtain
their costs.

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L. Hoyt for the complainants.

Wells & Bushnell for the junior incumbrancers.

THE CHANCELLOR:—If the junior incumbrancers had been subjected to any costs which were necessary to protect their rights, it would be proper that they should be paid before the suit was discontinued. From the facts stated in the case, I cannot see that it was necessary for them to put in any answer. They do not deny that their claims were truly stated in the bill. If so, suffering it to be taken as confessed would not have injured them, but would have saved expense to all parties. The bill must, therefore, be dismissed without prejudice to the future claims of the parties, and without costs.

*PURDY v. DOYLE AND OTHERS.

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Where land is sold under a decree of foreclosure and the surplus is brought into the court, judgment creditors who had obtained a specific lien thereon at law before the foreclosure are entitled to a priority of payment out of the proceeds according to the dates of their respective judgments.[1]

But if the person against whom their judgments were obtained had only an equitable estate in the mortgaged premises, so that the judgments could not bind his interest at law, the creditors here are to be paid upon the basis of equality only.

The rule of this court as to equitable assets is to put all the creditors on an equal footing.

Where assets are partly legal and partly equitable, this court cannot take away the legal preference as to the legal assets; but if one creditor has by

[1] See *Lemmon v. Heirs of Staats*, 1 Cow. 592.

1829.

Purdy

v.

Doyle.

reason of his priority been partially paid out of the legal assets, when satisfaction comes to be made out of the equitable assets, his claim thereon will be deferred until the other creditors have been paid a proportionate amount out of the equitable assets.

A bill filed in this court against heirs or devisees, has the same effect as the commencement of a suit at law in preventing the alienation of the estate. But if a judgment at law is obtained before the decree in this court, the plaintiff in such judgment thereby obtains a prior lien on the legal estate in the hands of the heirs or devisees.

Where a suit is commenced against five heirs for the debt of their ancestor, and the writ is only served upon three, but the plaintiff proceeds and takes judgment against all as joint debtors, he obtains a lien only upon the estate of those upon whom the process was served.

Where a creditor has obtained a lien upon a real estate by a judgment at law, if he subsequently brings an action of debt on his judgment, and recovers a new judgment, he will lose his first lien.

August 4th.

THIS was a creditor's bill, against the heirs and personal representatives of Dennis Doyle deceased, and was filed in April, 1827; and an injunction obtained restraining the defendants from disposing of or intermeddling with the estate of the intestate, or the proceeds thereof. After the service of this injunction, O'Connor, one of the administrators, who held a note against the intestate, brought a suit thereon against the infant heirs of Doyle, in the New York Common Pleas. The writ was served upon three out of the five heirs. John Doe, a fictitious person, was appointed the guardian *ad litem* of these three. And judgment was entered *against all the defendants, in like manner as upon a proceeding against joint debtors under the statute. This judgment was for \$471 80, and was docketed on the 8d of July, 1827. Dennis McCarty, another of the administrators, also brought a suit, in his own name, against the heirs, and obtained a judgment in the same way for \$122 31; which was docketed on the 18th of September, 1827. Patrick Barry, a creditor, also brought a suit and obtained a judgment in the same way for \$599 59, which was docketed the 21st of September, 1827. John McDonough also brought a similar suit and obtained judgment in the same court for \$180 69. He then brought an action of debt on

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that judgment in the Supreme Court, and recovered a new judgment thereon, which was docketed in May, 1828. The testator at his death was the equitable owner of a tract of land at Bloomingdale, subject to a mortgage to the Eagle Fire Company. That mortgage has since been foreclosed, and the surplus proceeds of the sale of the premises, amounting to \$2,202 35, have been paid into court, where they now remain. The complainant presented his petition, setting forth, among other things, that the judgments were not all justly due, and praying that the surplus moneys might be invested to abide the further order of the court, and that the same should not be paid out to the judgment creditors.

1829

Purdy
v.
Doyle.

H. Bleecker for the petitioner.

J. McKown for the administrator.

D. Selden for P. Barry.

J. Rhoades for J. McDonough.

THE CHANCELLOR :—The first question presented in this case is whether the fund in court is either legal or equitable assets. If it is such property as the judgment creditors could obtain a specific or general lien on at law, they are entitled to the fruits of their superior vigilance so far as they have succeeded in getting such lien. But if the property was in such a situation that it could not be reached by a judgment at law, and the fund is raised by a decree of this court, and *the creditors are obliged to come here to avail themselves of it, they will be paid upon the footing of equality only. (*Codwise v. Gelston*, 10 John. Rep. 507.) It clearly appears by the affidavits before me in this case that, as to one-half of the property out of which the fund in court was raised, the legal title never was in the ancestor, and of course it did not at law descend to the heirs.

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1829.

Purdy
v.
Doyle.

The first section of the act for the relief of creditors against heirs and devisees gives an action against the heirs of a debtor who dies seized of lands, &c. At law a contract to purchase and payment of the purchase-money does not give the purchaser a legal seizin of the land. In this court it is otherwise; and on the equity of that statute this court would give to the creditors satisfaction out of the equitable interest in the land descended to the heirs. But when the creditors come here for the purpose of reaching the equitable rights of the heirs, they must submit to the equitable rule of this court. In *Morrice v. The Bank of England*, (Cases Temp. Talb. 218,) that rule is stated thus: "The rule of this court with regard to equitable assets is to put all the creditors on an equal footing; so where the assets are partly legal and partly equitable; and though equity cannot take away the legal preference on legal assets, yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of the equitable assets, the court will defer him until there is an equality in satisfaction to all the other creditors, out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets.[1] The complainant filed his bill in this court, in behalf of himself and of all other creditors, to reach this equitable property in the hands of the heirs. This was equal to the commencement of a suit at law to prevent the alienation of the assets. (*Searle v. Lane*, 2 Vern. 88.) But if the legal title was in the heirs, the subsequent suits at law, in which judgments were obtained before any decree here, would give the judgment creditors a preference over any other creditors whose debts were of equal degree; and the heirs would not be obliged to defend those suits.[2] (*Mactier v. Lawrence*, 7 John. Ch. Rep. 206; *Martin v. Martin*, 1 Ves. sen. 211.)

[*561] As to the remaining half of the land sold *under the mort-

[1] *Wilder v. Keeler*, 3 Paige, 176; *Slade v. Van Vechten*, 11 id. 21.

[2] 2 R. S. (4th ed.) 606, sec. 4.

gage, it is stated in some of the affidavits that the deed was signed and acknowledged in the lifetime of the testator; but it does not distinctly appear whether it was actually delivered to him, so as to pass the fee, or was retained in the hands of the grantor until it should be executed by Heeney, the owner of the other half. If the intestate was actually seized of this half at the time of his death, the judgments recovered against the infant heirs would give the plaintiffs therein respectively a legal preference as to the three-fifths of the surplus arising from that half over any other creditors of equal degree. But those judgments cannot affect the other two-fifths which belonged to the heirs who were not taken in the suit. As to them the judgments were no lien on their share of the land. This was so decided by the Supreme Court, in *Jackson v. Hoag*, (8 John. Rep. 59,) where a sale under such a judgment was held not to affect the rights of the heirs who had not been served with process. There is another difficulty in this case which has not been explained by the administrators who are the owners of two of the judgments. It is stated in the petition that on a sale of other real estate which belonged to these infants there was a surplus of \$2,200, which has been paid to the administrators. If such is the fact, they ought to account for that sum and have it applied to the payment of their judgments, before they are entitled to come upon the fund in court. If the judgments of Barry and McDonough were prior to those of the administrators, an order might be made for the payment of so much of the fund as they have a specific lien upon towards their debts. But Barry's judgment is subsequent to both of those belonging to the administrators; and McDonough, by prosecuting a subsequent suit to judgment in the Supreme Court, has lost his first lien, and must now be postponed even to Barry, whose judgment is now the eldest.

Under these circumstances the fund in court must be invested by the assistant register, and remain until all the

1829.

Purdy
v.
Doyla.

1839. <hr/> Champlin v. Baldwin.	entangled equities between the parties are finally disposed of under a general reference in this suit; and the question of costs on this application is reserved until further order.
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*CHAMPLIN v. BALDWIN AND OTHERS.

Under the statute of distributions, brothers and sisters of the half blood are entitled equally with those of the whole blood to a share in the personal estate of the intestate, without regard to the ancestor from whom it was derived.

And if such personal property had been invested in land by the intestate, the land would have descended in the same manner

August 4th.

JOHN HATHORN died in 1824, leaving five children: Jane the complainant, and Mrs. Gustin by his first wife, and Mary Fergus Anthony and Robert Bruce, by his second wife, who is now Mrs. Baldwin. After the death of his first wife he purchased six lots in the city of New York, and took a deed therefor in his own name. Five of these lots were purchased for his two infant daughters, and were paid for with moneys which belonged to their mother, and which came from the estate of her father. Mrs. Gustin died in 1827, intestate and without issue. The complainant filed her bill in this cause for partition; and a reference was made to a master to ascertain the rights of the several parties in the premises, and particularly of the three children of Hathorn by his second wife; they being infants, and having put in an answer by their guardian. The master reported, that in his opinion the complainant was entitled to the whole of the five lots and to one-fourth of the sixth lot, subject to the dower right of Mrs. Baldwin in that lot. The cause was submitted on the pleadings and report, and the testimony taken before the master.

P. De Witt for the complainant.

P. W. Radcliffe for the defendants.

1839.

Champlin.
v.
Baldwin.

THE CHANCELLOR:—There can be but little dispute as to the facts in this case; but the master has mistaken the law as to the rights of the infants in the five lots. He has considered them as having come to the complainant and Mrs. Gustin, from their mother, and has therefore excluded the *brothers and sisters of the half blood of Mrs. Gustin from the whole of her share. It does not distinctly appear whether the money which came from the estate of Brooks, legally belonged to the children of the first wife; or whether it belonged to their father and was appropriated for their benefit because it came by the way of their mother. But for the decision of this question I shall consider it as legally belonging to them, which is certainly the most favorable view of the case for the complainant. In that case if Mrs. Gustin had died after her father, this money, by the statute of distributions, would have gone to all her brothers and sisters equally, without regard to the source from which it was derived. If she had purchased lands with it, those lands would have descended in the same manner; and the result must be the same when the money is vested in lands, by her father, for her use. In the fourth case specified in the statute of descents, (1 Rev. Laws, 53,)[1] it is provided that brothers and sisters of the half blood shall inherit equally with those of the whole blood. The only exception to this rule is where the inheritance came to the intestate by descent, devise or gift of some one of his or her ancestors. The land in this case did not come to Mrs. Gustin by descent, devise or gift from her mother. If the money came from her mother by gift, the donee had the right to lay it out as she pleased; and if she vested it in land it must descend in the same manner as if the money had been earned by her own exertions. It is to be considered in all respects as a new purchase by her.

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[1] See 2 R. S. (4th ed.) 159, sec. 15.

1829.

Webb
v.
Pell

There must be a decree declaring the rights of the parties accordingly; and as the property cannot be divided, it must be sold; and if Mrs. Baldwin has paid any thing out of her own funds for taxes and assessments, it must be refunded out of the purchase-money. I see no reason for taking an account of what was paid by Hathorn in his lifetime. If his heirs generally are entitled to one lot, and his two eldest daughters' portion of the money was \$804, as stated in the account, it is nearly right as it now is; and the expense of taking the account would be greater than any benefit which either of the parties would obtain thereby.

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*The costs of the respective parties must be paid out of the fund; and the share of the infants must be brought into court, and invested for their use.

WEBB AND OTHERS v. PELL AND OTHERS.

It is not necessary to obtain leave to file a bill of review, where it is brought to correct errors apparent on the face of the record.

Aliter, where it is brought upon the discovery of a new matter.

Where a subpoena was taken out upon a bill of review, and a *bona fide* attempt made to serve it within five years from the entry of the original decree, it was held to be a sufficient commencement of the suit, although the subpoena was not in fact served within the time allowed by law for appealing from the decree.

On filing a bill of review, a deposit must be made with the register of the same amount which is required on an appeal.

Where the solicitor for the complainant acted under a mistake as to the practice, he was allowed after the commencement of the suit to make the deposit *nunc pro tunc*.

August 4th.

THE object of this bill was to review a decree of this court for errors alleged to be apparent on the face of the record. It was filed without leave of the court, and without making any deposit. Within the time allowed by law

for appealing from a decree, a subpoena was taken out, and a *bona fide* attempt made to serve it. But it was not in fact served until after the expiration of the five years. A motion was now made on the part of the defendant to dismiss the bill for irregularity.

1899.

Webb
v.
Fell

J. Radcliff for complainants.

D. B. Talmadge for defendants.

THE CHANCELLOR:—The affidavit of the complainants' solicitor shows that a subpoena was taken out with a *bona fide* intent to serve the same within the five years. This is sufficient to remove all objection as to the time in which this suit was brought. It was not necessary to obtain any leave to file the bill of review. That is only necessary where it is brought upon the discovery of new matter. (Newland, 190; Mifford, 78.) But the complainants were irregular in not making a deposit to answer the costs. By the practice of the English Court of Chancery, a deposit of £50 was required on filing a bill of review, whether the same was founded upon the discovery of new matters, or upon error in law, apparent on the face of record. (Hind, 56; Gilb. For. Rom. 186; 1 Grant's Pr. 28.) In analogy to the deposit required on appeals, there must be a deposit here on a bill of review of \$100.(a) But as the complainants' counsel has acted under a mistake as to the practice, the deposit may now be made on payment of the costs of this application. The bill must be dismissed with costs, unless the deposit is made and these costs paid within twenty days.

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(a) The Revised Statutes having increased the deposit required on appeals to \$250 after the first of January, 1830, it is presumed the deposit on a bill of review upon a decree of the Chancellor will be increased to the same amount after that time.[1]

[1] See sec. 334, N. Y. Code.

1839.

Kirby
v.
Kirby.

KIRBY v. KIRBY.

A wife may compromise a suit brought against her husband for a divorce; and the court will only interfere so far as to see that she is not overreached or imposed upon in the settlement. •

The solicitor for the wife cannot insist upon proceeding with the suit against her consent, upon the ground that his costs are not paid.

August 4th.

THE complainants filed a bill in this suit for a divorce upon the ground of adultery, and obtained an injunction, a *ne exeat*, and the appointment of a receiver; and also an order for a monthly allowance pending the litigation. (*Ante*, 261.) The husband was unable to procure bail on the *ne exeat*; and the wife, without the consent of her solicitor, compromised the suit, on receiving security from the husband for a monthly allowance for her support. She directed the suit to be discontinued, and gave a written order to the sheriff to discharge her husband from prison. Her solicitor, previous to the discharge of the defendant, notified the sheriff not to release him from jail until his costs were paid. The sheriff having discharged the defendant,

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**E. Payne*, the solicitor, presented a petition, setting forth the facts, and prayed for an attachment against the sheriff. He contended that the complainant was not liable for the costs. That in contemplation of law the husband undertook to pay them at the time the bill was filed against him. A case of adultery is a peculiar one as to costs. The solicitor for the wife undertakes to render services for her which are of a character most hostile to the husband; and the payment for which he will in all probability attempt to evade. The statute (2 R. L. 197) has conferred upon this court extraordinary powers, to secure to the wife not only a support out of her husband's estate, but also the payment of the costs incurred in prosecuting her suit. Thus the solicitor of the wife has the same means of securing the payment of his costs that she has to secure a support. The

statute does not leave the solicitor, as in ordinary cases, to obtain his costs without any special assistance from the court, but it authorizes the court summarily to interfere and compel the payment of the costs. The statute authorizes the husband's property to be sequestered for the wife's support and the payment of her costs. When a *ne exeat* is granted it is intended for the joint benefit of the wife and her solicitor, as their rights are placed upon an equal footing by the statute. The solicitor having an equal interest with the wife in maintaining the *ne exeat*, the wife cannot discharge it without his consent. In ordinary cases a client cannot deprive his attorney of the remedy which the law gives him to obtain his costs from the opposite party. This was ruled in the case of *Martin v. Hawks*, (15 John. R. 405.) In that case it was also decided that the sheriff after notice from the attorney of his rights under the execution, was liable for an escape for discharging the defendant from custody upon a release being given by the plaintiff to the defendant. The present case is stronger than the one of *Martin v. Hawks*, as the adverse party here is alone responsible to the solicitor, and together with the solicitor's client. A wife who has herself no legal claims upon her husband, cannot release him from the claims of third persons for which he is alone responsible. Here the sheriff had full notice from the solicitor of his rights. After the *compromise between the wife and husband, the consent of the wife to discharge the husband was nothing more than the act of the husband. The remedy of the solicitor is clearly an attachment against the sheriff for contempt of court, committed by releasing the defendant when it was his duty to have kept him in close custody until discharged by order of the court. The sheriff at least should have asked the advice of the court before he discharged the defendant. The solicitor will not be able to collect his costs by suit from the husband. His only remedy is against the sheriff. A simple departing from the state is a violation of the *ne exeat*, although the violation in the first instance was

1829.

 Kirby
 v.
 Kirby.

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1829.

 Kirby
 v.
 Kirby.

unintentional, and the plaintiff has not been injured; and the court will direct that the amount of the *ne exeat* be brought into court, or that the bond of the sureties be prosecuted. (*Utten v. Utten*, 1 Meriv. 51; *Musgrave v. Medex*, id. 49.) The sheriff who has violated his duty in disobeying a *ne exeat* cannot be treated more indulgently than sureties. Where a sheriff releases a party in custody upon an attachment for non-payment of costs, he will be ordered to pay the money into court. (Anon. 11 Ves. 170.) Upon a *ne exeat* the sheriff has but one duty: to obey the mandate of the writ; either to keep the defendant in custody or to take security. If he violates this duty he is guilty of a contempt, and is bound to make complete reparation to the injured party. It is not necessary to obtain a decree for costs before proceeding against the sheriff. By the admission of the defendant the wife would have been entitled to a decree. She having compromised with him, cannot, by collusion, deprive her solicitor of his costs. In 1 Dicken's R. 114, where the parties colluded to dismiss the bill without the solicitor's knowledge, the Chancellor ordered his costs to be paid out of a fund in court.

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J. Edwards, contra:—An attorney or solicitor cannot enforce his claim for costs against the adverse party until the amount is settled by judgment or decree. This appears from all the authorities and particularly the case of *Martin v. Hawks*, (15 John. Rep. 405.) Until the judgment or decree *it cannot appear whether the attorney or solicitor will ever be entitled to costs as against the defendant. This can never appear in this case in consequence of the settlement. The solicitor for the complainant undertook this prosecution, subject to the hazard of the parties settling it, without making provision for his costs. This case is one above all others which the parties ought to be permitted to settle. The wife makes no complaint as to the settlement. It is full and perfect. As to the *ne exeat*, it never was granted for the benefit of the solicitor, but of the wife

alone. In form it is an order to keep the defendant in custody, unless he gives security not to depart the state. This is nothing more than bail in equity. (*Ex parte Bunker*, 1 Pr. Wms. 312; *Lloyd v. Cardy*, Prec. Ch. 171; *Amsinck v. Barklay*, 8 Ves. 594.) The security in form is like a bail bond at law; (*Gibert v. Colt*, 1 Hop. 496.) The *ne exeat* does not resemble final process. In *Martin v. Hawks*, the whole judgment belonged to the attorney, and a fraud was committed upon him. In this case the sheriff would have been liable to an action for false imprisonment if he had kept the defendant in custody after the settlement. If due diligence had been used the receiver might have collected sufficient funds to pay the costs.

1839.

Kirby
v.
Kirby

THE CHANCELLOR:—I have heretofore decided, in one of these matrimonial cases, that I would not permit the solicitor's claim for costs to stand in the way of a reconciliation between a husband and his wife. This is not exactly a case of that description; but it is an agreement on her part to discontinue proceedings instituted to dissolve the marriage contract, upon receiving a separate maintenance. In these cases the wife is, by the statute, authorized to proceed as a *feme sole*. She has therefore a right to compromise the suit in the same manner as any other party, although the court will always look into the case, so far as to see that she has not been overreached or imposed upon by her husband, in the settlement. In this case there is no pretence that she has not acted understandingly, and done that which was, probably, most for her own benefit. She applied to her solicitor to discontinue the suit, but he refused to do it unless his costs *were first paid. After consulting with her friends, and in the presence of her sister, and with her approbation, she completed the compromise, and ordered her husband to be released from prison. The sheriff was bound to discharge him, unless the solicitor had some claim which he had a right to enforce, without the consent of the wife. In *Martin v. Hawks*, (15 John. Rep.

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1829. 405,) and other cases where the attorney has been permitted
 Harrington to enforce the collection of costs against the adverse party,
 v. without the consent of his client, there was a judgment or
 Cannon. decree for costs, which gave the attorney a vested right to
 them. In this case it does not appear that any costs ever
 would have been given. The order for a monthly allow-
 ance was not an order in favor of the solicitor; and it was
 only directed to be paid by the receiver out of the estate
 which might come into his hands. The wife therefore had
 a perfect right to discontinue the suit, and discharge her
 husband; and it was the duty of the sheriff to release him
 on production of the order; (*Martin v. Francis*, 2 Barn. &
 Ald. 402.

The petition must be dismissed, and as the sheriff has
 done nothing more than he was legally compelled to do, the
 petitioner must pay the costs of opposing this application.

HARRINGTON AND CANNON v. HUGHES.

Where one-third of a lot of land was devised by a husband to his wife for
 life in lieu of dower, and after his death his daughter purchased the lot
 subject to the life estate of her mother, and then died leaving a will duly
 executed, by which she directed her executors to lease all her real estate,
 not before devised, and out of the rents to pay her mother, and several
 other persons, annuities for life; held, that the mother was entitled to both
 the annuity and the life estate in one-third of the lot.

Aliter, if the daughter had directed the annuity to be paid out of the rents of
 the whole lot.

August 4th.

[*570] CHRISTOPHER HUGHES died seized in fee of lot No. 16
 in Rose street, in the city of New York. By his will,
 made in 1807, he gave to his wife, the defendant, certain
 personal *property, and one-third of this lot, for life in lieu
 of dower. The residue of his property he devised to his
 executors in trust. His daughter Maria H. Williamson

purchased the lot from the executors, and took a conveyance of the same subject to the life estate of her mother in one-third of the premises. She built upon the lot, and the mother resided with her daughter thereon until the death of the latter in 1824. M. H. Williamson, by her will, after disposing of parts of her property specifically, directed the complainants her executors, to lease all her real estate not before devised, and out of the rents to pay her mother, and several other persons, specific annuities for life. The defendant after the death of her daughter received the annuity under the will, and also claimed her life estate in the one-third of the lot in Rose street, under the will of Christopher Hughes. The complainants filed this bill to compel the defendant to elect which she would take, the annuity or the life estate; insisting that she was not entitled to both.

1829.
Harrington
v.
Cannon.

E. Morrell for the complainants:—The whole of the house and lot is by the will of Maria H. Williamson the daughter devised to the executors, and constitutes a part of the fund out of which the defendant is to receive her annuity. The defendant for four years acquiesced in the provisions of the will and received the annuity, without preferring her claim for dower. It is well settled that a devisee cannot take advantage of one part of a will and reject another, when both parts relate to the same devise. If he will take advantage of the will, he must take entirely and not partially under it. There is always a tacit condition annexed to all devises of this nature, that the devisee shall not disturb the disposition which the devisor has made. (*Streatfield v. Streatfield*, Ca. T. Talbot, 176, per Ld. Ch. Talbot.) Where there is a claim upon a man's estate independent of him, and a claim upon the same under his will, the conclusion in equity is, that the devisee must abandon his original title or waive his title by the devise in the will. (*Noys v. Mordaunt*, 2 Vern. 581.) These principles apply to this case, and establish that the

1888.
 Harrington
 v.
 Cannon.

defendant cannot claim both her dower and the annuity. The one or the other must be abandoned by her.

* *W. W. McClelan* for the defendant:—The defendant is not put to her election in this case. The devise in the will of Christopher Hughes is nothing more than her dower. She is entitled to the same rights as if she claimed the devise as her dower at law. A widow is not put to her election, unless it is so expressed in the will. The estate of the defendant in the house and lot in question vested in her long before the death of her daughter. In this estate, the daughter had no interest and claimed no right whatever. It has been ruled where a testator whose estate was in settlement devised the whole in general words, that this was not a sufficient indication of the intention of the testator to dispose of that over which he had not power to do, so as to put the devisee to his election. (*Forrester v. Cotten*, M. 1760, 1 Eden, 582; *Forrester v. Cotten*, Ambler, 388.) And where a testator devised an estate to one which he had no right to do, and also gave him a life interest in other estates, it was held that the devisee could claim the first estate under an old entail, and was not put to his election. (*Cull v. Shotwell*, T. R. 778, 727; *Forrester v. Cotten*, Ambler, 388; *Pulleney v. Darlington*, 1 Brown C. R. 223; *Hearle v. Greenbank*, 8 Atk. 695; *Hearle v. Greenbank*, 1 Ves. sen. 298; *Graves v. Boyl*, 1 Atk. 509.) A devisee is only put to his election where it is so expressed in the will, or where unless he elects the devise will be disturbed *in toto*.

THE CHANCELLOR:—This is not a case where the defendant can be called upon to elect, as she is clearly entitled, both to the annuity and to her life estate in one-third of the lot in Rose street. There is nothing in the will of the daughter inconsistent with this claim. She bought the lot subject to the life estate of her mother; and at the time she made her will, she knew that estate still existed. She

does not direct her executors to rent the Rose street lot to raise the annuities; but directs all her real estate not before devised to be rented for that purpose. This includes all her interest in the Rose street lot, and nothing more; and that is only two-thirds of the lot during the life of her mother. If she had directed the annuity to be paid out of the rents of *the whole lot specifically, the case would have been different. (*Brown v. Rickets*, 3 John. Ch. R. 553.) The complainants' bill must be dismissed with costs.

1829.

Chase
v.
Dunham.

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CHASE v. D. R. AND A. F. DUNHAM AND OTHERS.

Under the general rule of the court, allowing the complainant to amend upon an insufficient answer, he cannot amend by leaving out the name of the defendant; and thus discontinue the suit against him without costs.[1]

August 4th.

THE complainant excepted to the answer of D. R. and A. F. Dunham for insufficiency; and the exceptions were sustained. These defendants then put in a further answer, in March, 1829, and in May term thereafter moved to dismiss the bill for want of prosecution. On that application the complainant obtained leave to amend upon payment of costs. He thereupon amended his bill by leaving out the names of these defendants entirely.

H. W. Warner, for D. R. and A. F. Dunham, now moved for costs against the complainant.

I. W. R. Bromley, contra.

THE CHANCELLOR:—The leave to amend given to the complainant in May last, was not an amendment under the general rule of the court. He had forfeited that right by neglecting to amend for several months after the further answer

[1] *Russell v. Spear*, 5 How. Pr. R. 142.

1829.
 Gardiner
 v.
 Dering.

was put in. It was, therefore, allowed only on payment of costs. But the amendment itself was not one contemplated by that rule, as to these defendants. The party cannot except the answer of a defendant, and then amend him out of court without costs under that rule. The object of the rule is to allow such amendments as may be necessary to obtain relief against the party whose answer is excepted to; as he can put in his answer to the amendments and exceptions together, without any more expense than if those amendments had been incorporated in the original bill.

The complainant must pay the taxable costs of these defendants within twenty days after service of the taxed bill.

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*GARDINER v. DERRING AND HEMPSTEAD.

A tenant for life has the right to take from the premises reasonable firewood for the use not only of the house which she herself occupies, but also sufficient to supply the house of her servant who cultivates the land, provided it can be done without injury to the inheritance.

August 4th.

THE defendant Mrs. Derring is tenant in dower of 175 acres of land on Shelter Island, upon which there is a dwelling-house which she occupies. There is also a small house on the premises which she holds under a lease from a former owner of the farm. This house is occupied by the defendant Hempstead, who works the farm for her. She claims the right to take reasonable firewood from the premises not only to supply herself but Hempstead also. The complainant filed his bill in this cause, and obtained an injunction restraining the defendants from taking any wood for the use of the small house. On the coming in of the answer, a motion was made to dissolve the injunction.

W. N. Dyckman, for the complainant.

D. Lord, jun., for the defendants, cited Co. Lit. 416; 2 Black. Com. 35, 123, 4; Shep. Touch. 93, n. 1; Cruise's Dig. tit. 8, sec. 10, and tit. 8, sec. 1.

1839.

Leggett
v.
Dubois.

THE CHANCELLOR:—The tenant for life is entitled to take reasonable firewood from the farm for the supply of those who occupy it; provided it can be done without injury to the inheritance. It is not absolutely necessary that the wood should be burnt on the premises; provided it is taken in good faith for the use of the tenant, and her servants, and in reasonable quantities. There is nothing in the bill or answer in this case to show that the quantity claimed is unreasonable, or that the inheritance would be injured. If the tenant in dower commits waste, she forfeits her estate. The court will not presume a forfeiture where no acts amounting to waste are alleged or shown.

The injunction must be dissolved.

*LEGGETT v. DUBOIS AND WALTON.

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Where a deposit is made upon obtaining an injunction, by way of security for costs, the right to the money cannot be decided until the final hearing of the cause on the merits.

The defendant is not entitled to the deposit immediately, upon a dissolution of the injunction on bill and answer.

THE complainant in this cause had obtained an injunction to stay a trial at law on making the usual deposit. On the coming in of the answer the injunction was dissolved: August 6th

J. Rhoades, now on behalf of the defendants, upon an affidavit stating that they had obtained a verdict in the suit at law brought against the complainant, moved to have their costs of preparing for trial at the former circuit paid out of the money in court.

1820.
 Decarters
 v.
 La Farge.

THE CHANCELLOR:—The right to deposits of this description cannot be ascertained in this stage of the suit. Although the injunction is dissolved on the coming in of the answer, it may be revived and made perpetual on the final hearing, upon the pleadings and proofs. If it should turn out by the final decree in this cause that the suit at law was unconscientious or inequitable, the defendants would not be entitled to the costs which they had improperly made in that suit. The deposit must remain to abide the final decision of the cause.

DECARTERS AND OTHERS v. LA FARGE AND OTHERS.

Where upon the hearing of a cause the counsel for the defendants abandoned the defence, after hearing the opening argument in behalf of the complainants, the court refused to grant a rehearing upon the ordinary certificate of counsel.

To obtain a rehearing under such circumstances, the defendants will be required to show a violation of duty on the part of their counsel, or that he had clearly mistaken either the law or the facts.

August 20th.

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THIS was an application for a rehearing. The object of the suit was to set aside a conveyance to La Farge, for about *36,000 acres of land in Jefferson county, made by Rottiers as the agent of the complainants, on the ground of fraud between the purchaser and agent. The cause was brought to a hearing at the last May term; and the opening counsel consumed nearly three days in reading and commenting on the pleadings and proofs. When the opening argument was concluded, the counsel for the defendant, Mr. John V. Henry stated to the court that he thought it unnecessary to occupy time in behalf of his clients, as he entertained no hopes of their success; that he felt confident of being able to show that some of the complainants' points were untenable; but that two points had been taken which he deemed

to be so decidedly against the defendants that in his opinion their defence could not be sustained. The two points alluded to were the absence of all proof of the alleged payment of a part of the consideration money to Rottiers on the purchase; and the nature and suspicious character of the securities given for the residue. In justice to himself he ought to state that he had always advised his clients it was indispensable that they should have some proof of the payment which was alleged to have been made at the time of the same. He therefore declined arguing the cause on the part of the defendants; and a decree was thereupon entered in favor of the complainants, setting aside the conveyance as fraudulent, and directing an account.

1889.

Decartens
v.
La Farge.

H. Bleeker, now presented a petition on the part of the defendants, *La Farge* and *Rottiers*, for a rehearing, upon the ground that their proofs had not been read at length, and that the cause had not been argued on their part. The petition was accompanied by the certificate of two counsel, setting forth that they had perused the papers in the cause and were of opinion that there ought to be a rehearing. *Buck v. Fawcett*, (8 Peere Wms. Rep. 242,) was cited in behalf of the application.

A. Van Vechten and *B. F. Butler*, contra.

*THE CHANCELLOR:—I have recently decided that a rehearing in this court is not a matter of course on the usual certificate of counsel, except in those cases which are specially provided for by the 70th rule. (*Land v. Wickham*, 1 Paige's Rep. 256.) I have also found it necessary to alter the form of a certificate to be given by counsel on applications for rehearing, which at present is too vague and indefinite. (New Rules, 113.) In England a rehearing seems to be almost a matter of course: but I apprehend this is a case in which a rehearing would not be granted even there, without special cause shown. Respect will be

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1829.
Decartens
v.
La Farge.

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paid to the opinions of counsel who have deliberately examined a case; and who certify under their oath of office that they believe the court has come to a wrong conclusion. Yet when, as in this case, they merely certify their opinion that a rehearing ought to be granted; without giving any reasons or pointing out any error in the decree, their certificate is more than counterbalanced by the declaration of other counsel on the same side, who conducted the defence from the beginning, and prepared himself for the argument; and who, after hearing the able and convincing argument of the opening counsel for the complainants, abandoned the cause as wholly indefensible. The case on the part of the complainants is much stronger when we take into consideration the fact that the counsel, who thus declined arguing in opposition to their claims, is one of the oldest and ablest practitioners in this court, and is distinguished for his fidelity to his clients. To obtain a rehearing in such a case the defendants should show a violation of equity on the part of their counsel, or that he had acted under a clear mistake, either as to the law or the facts. That their counsel wilfully neglected his duty, no one can for a moment suspect; and there can be very little doubt of the correctness of his opinion both as to the law and the facts of the case. Although the testimony was not read at length, yet it was fully gone into by the opening counsel; and all that related to the two points upon which the defence was abandoned, was either read or referred to by the counsel, and noticed by the court. That which *was passed over related to the question of inadequacy of consideration, as to which I have never formed any opinion. The decree is founded upon the fact that the powers of Rottiers had been revoked before the conveyance; that La Farge either knew or had reason to believe such was the fact; that the \$5,000 alleged to have been paid down, was never in fact paid; that the mortgage given back by La Farge to secure more than three-quarters of the purchase-money, including the interest for five years, was upon only one-half in quantity, and

upon less than one-third in value of the lands conveyed ; and that the alleged bond, by which La Farge made himself personally liable for the payment, was not executed at the time, but had been since forged or antedated for the purpose of preventing the course of justice, by covering up the fraud.

1829.
Decartens
v.
La Farge.

The new power to Harrison, by which the authority of Rottiers was revoked, was executed by the complainants in Antwerp, on the 23d of June. Rottiers left that place suddenly and unexpectedly, and arrived in New York before the revocation reached this country. He arrived at Watertown, on Sunday morning, the 19th of August, and immediately set off for the residence of La Farge, taking his attorney with him ; and before night he made a bargain for the sale of 86,000 acres of the complainant's lands, including the Cole and Shurtliff farms, with stock, &c. The next day a deed and mortgage were executed, and as the defendants allege, \$5,000 in money was paid, and the bond given for the residue. But the subscribing witness to the mortgage saw no bond executed or money paid ; and the defendants have not thought proper to call upon their attorney who was present to prove the fact, although they were advised by their counsel it was indispensable. I think also the complainants succeeded in showing, so far as it is possible to show a negative, that the money was not paid ; and that La Farge had not the means of raising the money at that time. The poorest lots, both with respect to location and as to the quality of the land, appear to have been carefully selected and included in the mortgage ; and the covenants and conditions therein contained appear to be wholly inconsistent with the idea that La Farge *was to be personally responsible. The bond is not referred to in the mortgage, and no person ever saw it until it was reluctantly drawn forth under the order of the court ; and when finally produced, it turns out to be written on paper of a different size, texture and quality, from that on which the mortgage is drawn ; with different ink, in a different handwriting,

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1829.

Norton
v.
Whiting.

and without any subscribing witness. If it is a criminal offence to hire witnesses to keep out of the way, it must be equally criminal to attempt to palm a forged and fictitious paper upon the court as evidence, for the purpose of perverting the course of justice; and under the circumstances I thought it my duty to direct the counsel to place the papers in this case in the hands of the district attorney of the proper county. That question cannot be reviewed on this application; and I have only adverted to the fact for the purpose of showing the improbability of changing my opinion on the question of fraud.

The petition for a rehearing must be dismissed with costs.

NORTON v. WHITING AND OTHERS.

Where a debtor who gave to his indorser a judgment for his security, and afterwards another person became the indorser in the place of the former one, and took an assignment of the judgment as his security, with the assent of the debtor, held that such judgment was valid, and took priority over a junior judgment, although the assignee of the first judgment was not compelled to pay the notes indorsed by him until after the docketing of the junior judgments.

Where a judgment creditor having a claim upon the surplus moneys raised by a sale of mortgaged premises, litigates in good faith before the master, on a reference to settle the priority of liens, he will not be charged with the costs of such litigation.

But if he excepts to the master's report and those exceptions are disallowed, he may be charged with the costs of the hearing on the exceptions.

August 21st.

THE case came before the court upon an exception taken by the defendant Warner, to the report of the master, as to the priority of the liens of several defendants upon a surplus raised on a mortgage sale. In 1819, Weeks was the indorser for Whiting, the owner of the equity of redemption *who gave him a judgment for his indemnity. In 1820, Solingen was substituted as the indorser in the place of

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Weeks ; and the latter, at the same time, with the assent of Whiting, assigned the judgment to Solingen for his security and indemnity. The judgment of Warner against Whiting was recovered in 1824, since which time Solingen has been compelled to pay the indorsements which he had previously made. In 1827, Whiting assigned the mortgaged premises, and other property to Mercien and others, in trust to secure a debt due to the New York and Schuylkill Coal Company, and then to pay Solingen the amount of his indorsements. The whole property assigned is insufficient to pay the debt due the coal company. In January, 1828, Solingen assigned his interest in the judgment to Mercien and others ; who, by virtue of that assignment, claim the surplus moneys now in court.

1829.

Norton
v.
Whiting.

J. A. Lott for Warner.

J. W. Gerard for Mercien and others.

THE CHANCELLOR :—From the facts presented by the answers and the proofs before the master, I am satisfied the judgment of Weeks was a valid and subsisting security in the hands of Solingen for the amount which he might be compelled to pay on his indorsements, not exceeding the amount for which it was a security in the hands of Weeks. The amount to secure which the judgment was given, was never in fact paid by Whiting ; but the responsibility, as well as the security therefor, were both transferred by Weeks to Solingen, who was substituted in his place. This was long before Warner's lien was obtained ; and there is no doubt that Solingen could have enforced the Weeks' judgment against the property in the hands of Whiting for the amount, whenever he was compelled to pay the same on his indorsements. He had not only the prior equity, but the legal right. It is insisted however that he has lost his priority by the subsequent agreement with Mercien and others. That agreement was not made for the benefit of

1829. Warner, and he has no right *to take advantage of it. If
 In the Matter Solingen had made an agreement, in express terms, not to
 of Tracy. use his judgment to the injury of the coal company, it would not have prevented his using it for their benefit, and to protect the property from the lien of Warner's judgment. But under the circumstances it is doubtful whether he might not have claimed to the extent of this judgment even as against the assignees of Whiting.

The fund in court being less than the amount due on the Weeks' judgment, Mercien and others are entitled to the same, under the assignment of January, 1828. With the consideration of that assignment Warner has nothing to do. If the assignment is invalid, the surplus belongs to Solingen, in his own right, as owner of the Weeks' judgment. Warner having failed in establishing any right to the surplus, has no equitable claim for his costs of the reference. But as he litigated the matter before the master in good faith, for the purpose of ascertaining his rights, he is not to be charged with the costs of the adverse party on the reference. Having put Mercien and others to the expense of a hearing on his exception to the report, after all the facts were known, he must pay the costs produced by that exception.

IN THE MATTER OF TRACY, AN HABITUAL DRUNKARD.

It is the privilege of a party against whom a commission of lunacy is issued, to be present at, and to have notice of its execution.[1]

If peculiar circumstances render it improper or unsafe to give such notice, they should be stated in the petition to the court, so that a special provision may be inserted in the commission dispensing with notice to the party. In this state it is not a matter of course to allow an inquisition to be traversed, but the same rests in the sound discretion of the court.

The practice here is to award a feigned issue in all cases where a traverse would be proper, instead of allowing a formal traverse.

[1] *In the Matter of Pettit*, 2 Paige, 174

An issue should be directed upon the application of the party in all cases of doubt, especially under the act respecting habitual drunkards. 1829.
Whether any, and what allowance will be made to a party out of this estate in the hands of a committee, depends upon the circumstances of each particular case. In the Matter of Tracy.

*Where a person for any considerable part of his time is intoxicated to such a degree as to deprive him of his ordinary reasoning faculties, it is *prima facie* evidence that he is incapable of managing his affairs. [*581]

SOME time during the last winter a commission in the August 24th. nature of a writ *de lunatico inquirendo* was issued, upon which Anson Tracy was found to be incapable of conducting his affairs in consequence of habitual drunkenness.

A. L. Jordan now presented a petition in behalf of Tracy, in which it was stated that he was not incapable of conducting his own affairs; that he had no notice of the taking of the inquisition against him; that his property had been taken out of his hands and placed under the control of a committee: and praying that the proceedings might be set aside, and his property restored to him; or that he might be permitted to traverse the inquisition, and that a reasonable allowance for the expenses of the traverse might be paid out of his estate.

A. P. Holdridge, contra, produced numerous affidavits, among which were those of Tracy's father, and father in law, of his brother and his two daughters, of his brother in law and his family physician, showing that his property would be unsafe in his hands.

The CHANCELLOR said it was the privilege of a party against whom a commission of lunacy is issued to have notice, and to be present at its execution. That if there were any peculiar circumstances in the case which rendered it improper or unsafe to give notice to the party, as in some cases of furious madness, the facts should be stated in the application to the court, so that a provision might be inserted in the commission dispensing with the necessity of

1829. notice. That as the proceedings were irregular in this respect, Tracy must have an opportunity to be heard and to produce his witnesses before the jury. But as it appeared from the affidavits on the other side that it would be unsafe to discharge the committee, the present proceedings must stand until further orders. A new commission must issue, and due notice of the time and place of executing the same must be given to Tracy.

[*582] *Tracy's counsel then waived the want of notice, but insisted on his right to traverse the inquisition, and that a suitable allowance for the expense of the proceeding should be paid out of his estate by the committee.

THE CHANCELLOR:—By the 6th section of the statute 2 & 3 Edward 6th, chapter 8, (5 Statutes at Large, 301,) it is declared and provided that if any person shall be untruly found a lunatic or idiot, the person grieved thereby may have his or her traverse to the inquisition and proceed to trial therein, and have the like remedy and advantage as upon other cases of traverse upon untrue inquisitions or offices found; any law, usage or custom to the contrary notwithstanding. Under this statute, in England, a traverse of the inquisition is considered a matter of right, and the court has no discretion on the subject, except so far as to ascertain that the party in whose name the application is made wishes to traverse. (*Ex parte Ferne*, 5 Ves. 450, 883; *Ex parte Sherwood*, 19 Ves. 280.) But that statute has never been re-enacted here. In this state the care and custody of the estates of lunatics, idiots, and habitual drunkards is confided to this court, without any restriction or limitation.[1] The manner in which that control is to be exercised must therefore depend upon the sound discretion

[1] This power is now vested in "Supreme Court" which is substituted for "Chancellor" and "Court of Chancery" pursuant to ch. 280 of 1847; and in certain cases in the "County Court" which was substituted for "Court of Common Pleas" pursuant to chap. 30 of the Code of Procedure, sub. 8. See 2 R. S. (4th ed.) 237, secs. 1, 2, 3.

of the Chancellor. He may direct an issue to inform his conscience, whenever he deems it necessary, as in other cases. The practice here has been to award an issue, in all cases where a jury trial was proper, instead of permitting a formal traverse. (*Wendell's case*, 1 John. Ch. R. 600; *Folger's case*, 4 John. Ch. R. 169.) It is certainly proper in cases of doubt to permit a party to have a trial by jury before he is deprived of his property or his liberty, either by his misfortune or his fault. I should think it a discreet exercise of the power of the court to direct an issue in all cases of doubt, especially under the act relating to habitual drunkards. But a very erroneous impression appears to have gone abroad on this subject. It is supposed by many that the prosecutor in such cases is bound to prove affirmatively that an habitual drunkard is incapable of managing his affairs. On the contrary, the fact that a person is *for any considerable part of his time intoxicated to such a degree as to deprive him of his ordinary reasoning faculties, is *prima facie* evidence, at least, that he is incapacitated to have the control and management of his property.

1839.

In the Matter
of Tracy.

[*588]

Whether an allowance should be made to the party out of the estate to pay the expenses of a traverse is a different question from the one whether he shall be permitted to subject the prosecutor to the expense of a trial. In *Sherwood v. Sanderson*, (19 Ves. 290,) Lord Eldon allowed the costs of a traverse, but desired it to be distinctly understood that he did not consider the granting of costs a matter of course. In *Folger's case*, before cited, Chancellor Kent charged the whole costs of an unsuccessful traverse upon a third party, at whose instance the issue was awarded. And in *M'Lean's case*, (6 John. Ch. R. 440,) although he permitted an issue to try the question of sanity, he refused to charge the expense thereof upon the estate of the lunatic. In every case of this kind the court must exercise a sound discretion, regulated by the particular circumstances, so that while the party proceeded against is not deprived of the means of protecting his legal rights, the property, which

1839. is necessary for the support of himself and his family, shall
 Bruyn not be unnecessarily wasted in useless litigation.
 v. In this case, although from the affidavits before me I can
 Receiver of the Middle have but little doubt as to the result, yet as the property is
 Dist. Bank. large, and the party has not had an opportunity to be heard
 on the taking of the inquisition, I shall grant an issue, and
 direct the committee to pay to the counsel of Tracy twenty-
 five dollars out of his estate to defray the necessary expen-
 ses on his part.

[*584]

*BRUYN v. THE RECEIVER OF THE MIDDLE DISTRICT
 BANK.

When a bank becomes insolvent, the cashier has no lien upon the money in the bank for his deposits therein or for the payment of his salary.[1]
 He has no other or greater rights than the other creditors of the institution.

August 24th.

SEVERYN BRUYN was the cashier of the Kingston branch of the Middle District Bank, and at the time the bank stopped payment he was a depositor to the amount of \$105, and was allowed an annual salary, out of which he was to pay his own clerk, and was also to furnish a banking room for the accommodation of the bank. He petitioned to retain out of the moneys in the bank, at the time it stopped payment, the amount of his deposit, and an allowance for his salary up to that time *pro rata*. The receiver contended he was to be considered a mere creditor of the bank, and to receive his dividend with the other creditors. The question was, by consent of the parties, submitted to the court.

THE CHANCELLOR:—The money in the bank did not belong to the cashier, but to the institution. Neither the cashier or clerk had a right to exercise any control over it, except so far as they were authorized by the directors.

[1] *Bank of Niagara v. Roosevelt*, 9 Cow. 409.

The cashier had no lien upon it for the payment of his salary or deposit; [1] and the directors could not give him such a lien under the provision of the act of 1825, in contemplation of the insolvency of the institution. It is evidence of the fairness of the officers of the branch that they were not informed of the situation of the mother bank in time to withdraw their deposits; but it is their misfortune to be left in the same situation as other depositors of the institution.

1829.

Matter of the
Receiver of the
Middle Dist.
Bank.

The receiver is authorized to allow such sum for the use of the banking room, and to the clerk for attending to demand payment, and protest notes which fall due, as he may deem reasonable.

[1] Money deposited generally with a banker, becomes the money of the depository. *Chapman v. White*, 2 Seld. 412.

***IN THE MATTER OF THE RECEIVER OF THE MIDDLE DISTRICT BANK.**

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The right of a debtor to a bank to off set any demand he held against the bank at the time it stopped payment, is not altered by the appointment of a receiver. [2]

If the receiver is compelled to resort to an indorser, where the real debtor is unable to pay, such indorser can off set the bills of the bank which he held at the time it stopped payment, unless he is indemnified by the real debtor.

Where bills of a bank are obtained by one of its debtors after it stops payment, they cannot be set off by such debtor against the debt he owes the bank. [3]

August 24th.

THE receiver of the Middle District Bank submitted a variety of questions to the court, for instructions thereon relative to the discharge of his duties, on which the following directions were given:

THE CHANCELLOR:—In the case of *Miller v. The Receiver of the Franklin Bank*, (*ante*, 444,) this court decided

[2] But see *Haxton v. Bishop*, 3 Wen. 13.

[3] *Bank of Niagara v. Roosevelt*, 9 Cow. 409.

1839. that any equitable off-set which the debtor had at the time the bank stopped payment was not altered by the appointment of a receiver. It makes no difference whether the debt of the bank was then payable or has become due since. If a debtor claims to off set bills which were then in the hands of any other person for his use, the receiver should be satisfied he was the real owner of the bills at that time; and if the amount due thereon is lost, that the loss will legally and equitably fall on such debtor, and not upon the person who had them for his use. If the real debtor is unable to pay, and the receiver is compelled to resort to the indorser, who is eventually to be the loser, he has the same equitable claim to off set bills which he had at the time the bank stopped payment. But no such off-set should be allowed to an indorser where he is indemnified by the real debtor, or where the latter can be compelled to pay.

An overdrawing is a debt due to the bank, and if the person who has overdrawn his account was, at the time the bank stopped payment, a *bona fide* holder of the bills in his own *right, the same rule of set-off must be applied. The evidence on which the receiver should act in allowing set-offs should be such as to satisfy him that the debtor could sustain such off-set in a court of justice, if a suit was brought against him. If the receiver thinks proper to rely upon the affidavit of the party, he should at least require him to state when, where and from whom he received the bills, and under what circumstances.

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Where the debtors and their sureties are insolvent, and only able to pay a part of their debts, it will be no injury to the creditors of the institution, if the receiver takes Middle District bills in payment; but in all such cases the receiver should estimate such bills at the probable amount of dividend which would be obtained thereon; that is, if the debtor is able to pay 75 per cent. of his debt, he should not be permitted to pay in bills at par, when they are in fact worth less than seventy-five per cent. in good money.

In one of the suits brought by the receiver of the Greene County Bank, the Supreme Court decided, after full argument, that under the provisions of the act of 1825, bills which had been obtained by the debtors of the bank, after it stopped payment, but before the appointment of a receiver could not be off set; that the equitable right of the debtors to a set-off was not altered by the neglect of the attorney-general to apply and obtain the appointment of a receiver immediately. This must be considered the legal rule by which the receiver is to be governed. It having been decided there was no off-set at law in such cases, there can be no pretence for claiming it in equity, as it is wholly opposed to every principle of equity and justice.

If bills of the bank were taken to exchange, and remained on hand at the time the bank stopped payment, they should be returned; but if the agent had parted with the bills, it would be manifestly unjust to allow him to receive Middle District bills afterwards to off-set.

1829.

Lawrence
v.
Greenwich
Fire Ins Co.

*LAWRENCE v. THE GREENWICH FIRE INSURANCE COMPANY.

[*587]

Where the holders of a majority of the stock of the corporation neglect to choose officers to take charge of the property of the corporation, a receiver will be appointed, upon the application of the owners of a minority of the stock, to take possession of the effects of the corporation and to preserve the same for the benefit of the stockholders generally.

THIS was a bill filed by a stockholder against the Greenwich Fire Insurance Company and some of its former directors. It alleged that the directors had violated their trust; that the corporation was virtually dissolved; that it had no office or place of business; and that it had no officers to attend to its concerns. The bill had been taken *pro*

August 24th.

1892.
 Lawrence
 v.
 Greenwich
 Fire Ins. Co. *confesso* against the company, upon a special service and publication of notice, in pursuance of an order of the court.

H. H. Warner, for the complainant, now moved for a receiver to take charge of the property and effects belonging to the corporation.

D. Selden, in behalf of the former directors, who had answered, opposed the motion.

THE CHANCELLOR:—From the facts disclosed in the bill, answers and petition, it is evident there is no person at present authorized to take charge of and conduct the affairs of the corporation. If those who own a majority of the stock neglect to elect directors to take charge of the property of the corporation, the minority are not to be the sufferers in consequence of such neglect. Under these circumstances it is proper to appoint a receiver to take charge of the effects of the company, and preserve them for the benefit of the stockholders generally. The cases of *Andrews v. Powis*, (2 Brown's P. C. 504,) and *Maguire v. Allen*, (1 Ball & Beat. 75,) fully sustain the principle that a receiver may be appointed in any case, where it is necessary for the preservation of the property pending litigation.

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*It must be referred to a master to appoint a receiver with the usual powers, and to settle the amount of security to be given, and to ascertain the sufficiency of the sureties offered. After the appointment is completed, the present officers of the institution, if any there are, and all former officers, must deliver over, upon oath, under the direction of the master, all books, vouchers, property or effects in their hands, or within their power or control, belonging to the company.

1839.

Brown
v.
Story.

BROWN AND OTHERS v. STORY.

Where a party pending the suit is admitted to prosecute a defence in *forma pauperis*, he is not excused from the payment of the costs which accrued before he was admitted to defend in that manner.

Whether, under the statute of this state, a party can be admitted in any case to defend in *forma pauperis*? *Quære*.

THIS was an application for leave to defend in *forma pauperis*. The defendant commenced a suit at law against the complainants, whereupon they filed a bill in this cause and obtained an injunction staying the suit at law. Exceptions were taken to the defendant's answer, which, on reference thereof, were allowed by the master. In addition to the application for leave to defend in *forma pauperis*, the defendant asked to be excused from payment of the costs on the exceptions. August 24th.

B. F. Butler, for the complainants.

William Kent, for the defendant.

THE CHANCELLOR:—I have already had occasion to say that applications of this kind ought not to be encouraged in this country, where, if a party has a just claim or valid defence, solicitors and counsel are always ready to assist him on receiving the trifling disbursements which must be paid to other officers of the court. A claim to be excused from paying costs already accrued has never been allowed. (*Mosel*, Rep. 68; *Wilkinson v. Belcher*, 2 Brown's Ch. Cas. 272.) Even after a party is admitted to prosecute as a *pauper, he is liable for the costs of any irregular or improper proceedings on his part. (*Home v. Ailoff*, *Tothill*, 139.)

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It is at least doubtful whether a party is to be permitted to defend as a pauper in any case.[1] In England the right

[1] 2 R. R. (4th ed.) 658, sec. 1, 2, 3.

1829.

Brown
v.
Story.

to sue and defend in Chancery, in *forma pauperis*, depends upon the rules of the court. The statute, (11 Hen. 7, ch. 12,) only extends to suits prosecuted in the common law courts. And it has there been held that a party is not entitled to defend as a pauper, except in the particular cases provided for in a subsequent Act of Parliament. (Barnes' Notes, 328; 5 Bac. Abr. tit. *Pauper*, B. p. 299.) The statute of this state, (1 Rev. Laws, 524,) provides for the prosecution of suits by poor persons in Chancery as well as at common law, but makes no provision for a defence of a suit in *forma pauperis*. In order to obtain that privilege the defendant would be compelled to swear he was not worth, and had not in his possession or within his power or control, property or other means to the amount of 5*l*.; and he would not, as in the case of a complainant, be permitted to except to the subject matter of the litigation. In *Spencer v. Bryant*, (11 Ves. 49,) Lord Eldon decided that an affidavit of the defendant that he was not worth 5*l*., except the matter in question, was not sufficient to authorize him to defend in *forma pauperis*.

But in this case the affidavit is wholly insufficient. It appears that, in addition to the defendant's claim of \$15,000 against the Browns, the United States are indebted to him for wages, and he has already paid his solicitor and counsel in this cause \$74. He produces no certificate from them that in their opinion he has a good and sufficient defence in this suit, and he does not even himself swear that he has a meritorious defence to the bill filed by the complainants in this cause.

The petition must be dismissed with costs.

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Where certain persons are invested by statute with discretionary powers, Chancery will not interfere to correct mere errors of judgment, if the powers conferred have not been illegally or unconscientiously exercised.

Whether at common law, civil and corporate officers are authorized to hold over after the expiration of the time for which they were elected, until successors are appointed. *Quere.*

Where the officers of a corporation are not authorized to hold over, if the corporators, without the presence of any officers, or any act to be done on their part, possess the power to assemble and choose officers to carry into effect the objects of the incorporation, a neglect to choose officers at the proper time will not work a dissolution of the corporation, but will merely suspend the exercise of the powers of the corporation until proper officers are chosen.[1]

But if the corporators have not the power to fill vacancies without the presence of their officers, or something to be done by them preparatory thereto, and such officers do not attend, or neglect to do the act requisite to the validity of the appointment, or there are no such officers, then, as the powers of the corporation cannot be revived, it is virtually dissolved.

The right of voting by proxy is not a general right, and the party who claims such right must show a special authority for that purpose.

The act of March 6, 1807, to raise moneys to drain the drowned lands in the county of Orange, gives the right of voting for commissioners under the act only to the persons who own lands in fee.

Where, in the election of corporate officers, no particular mode of proceeding is prescribed by law, if the wishes of corporators have been fairly expressed and the election was conducted in good faith, it will not be set aside on account of any informality in the manner of conducting the same.

By the act of March 6th, 1807, entitled "An act to raise moneys to drain the drowned lands in the county of Orange," three inspectors were appointed to determine the number of acres of land belonging to each owner or proprietor which would be benefited by removing the obstructions in, and straightening the course of the river Wall Kill and the two streams falling into the same; and to make a roll thereof containing a statement of the several lots so

[1] See *Ex parte Heath*, 3 Hill, (N. Y.,) 42; 2 Kent, 259; *Trustees of Vernon v. Hills*, 6 Cow. 23; *McCall v. Bryant May. Co.*, 6 Conn. 428; *All Saints Church v. Lovett*, 1 Hall, 191.

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to be benefited, with the number of acres in each, distinguishing whether the same was held in severalty, in common, in joint tenancy or co-parcenary, and the names of their respective owners or proprietors that might come to their knowledge; and to ascertain and determine the proportion that each *owner or proprietor should pay per acre of any sum of money to be raised for the purpose of draining such lands, according to the proportion of benefit which such owners or proprietors should eventually receive. Five commissioners were also named in the act to remove the obstructions, &c., for the purpose of draining the lands; with power to them and their successors, from time to time, to apportion such sums of money as might be necessary for that purpose, among the owners or proprietors, according to the roll made by the inspectors: and to raise the same by a sale of the lands, if not paid by the owners or proprietors. The powers of the commissioners named in the act were to cease on the first Tuesday in June, 1808; at which time the owners or proprietors of the said tract were to meet at the court house in Goshen, and elect a like number of commissioners to transact and manage the said business for one year; and the first Tuesday of June in every year thereafter was made the anniversary day for the owners or proprietors of the said tract to meet at the same place to elect a like number of commissioners to conduct and transact the business from year to year; which commissioners, during the year for which they were respectively elected, were to possess all the powers, perform all the duties, and keep regular accounts, and account as fully as the commissioners named in the act were authorized and required to do. Each of the owners or proprietors of the said tract who should be assessed on the roll for ten acres, was by the act to be entitled to one vote; and also one vote for every twenty acres he might own above ten and under four hundred acres; and an additional vote for every fifty acres he owned above four hundred acres.

A roll or list of the lands was made by the inspectors

and filed in conformity to the act; and commissioners were regularly elected from year to year until the first Tuesday in June, 1828; when, through inadvertence, no election was held, but the old commissioners continued to act.

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Many attempts had been made, and about forty thousand dollars had been expended from time to time in endeavoring *to drain the drowned lands by the bed of the Wall Kill, but without success. In April, 1826, the legislature passed a supplementary act, authorizing the commissioners then in office and their successors, in the further prosecution of the draining of the said lands, to cut a canal from the river on the east side thereof, above Horse Island, on the most eligible route or course to the river, on the east side of G. N. Philip's mill pond, about three miles below. Previous to and after the passage of this last act, the owners and proprietors of the drowned lands were divided in opinion as to the best mode of draining them; some were in favor of doing it by means of the canal, and others by deepening and widening the bed of the Wall Kill at the outlet of the swamp. Many surveys and estimates were made to ascertain the practicability and expense of the two projects. At the last anniversary election for commissioners two tickets were formed, the one containing the names of those who were supposed to be in favor of draining by the canal route and the other of those who were in favor of draining by the outlet or bed of the Wall Kill; and two of the owners or proprietors were appointed inspectors of the election by the meeting. The persons in favor of the canal ticket had proxies from owners or proprietors, who were entitled to 94 votes; and McGregor, one of the complainants, who was in favor of the other ticket, had proxies for 26 votes. He also claimed to give 82 votes on a tract of 3,500 acres, which had belonged to his uncle in England, who died a few months previous seized of the same. McGregor likewise claimed a right to vote on 2,000 acres of 3,500, under an alleged agreement with his uncle to work it on shares for 20 years. The inspectors of the election decided that under

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the act the owners or proprietors must vote in person, and were not authorized to appoint a proxy for that purpose. Those votes were accordingly rejected. They also decided against McGregor's right to vote upon the 8,500 acre tract or upon the 2,000 acres thereof. After all the persons present except two had voted, and after some of them had left the court house, McGregor snatched the hat which contained the votes from the inspectors, and refused to return it. The inspectors then *procured another hat, and called upon those who had not voted to hand in their votes, and then canvassed the votes thus given; by which it appeared that the defendants, except Gen. Wickham, whose name was on both tickets, had received 77 out of 79 votes. The inspectors thereupon declared the defendants, who composed the canal ticket, duly elected; and they made a certificate thereof, by which they declared them duly elected *by a majority of the votes in possession of the inspectors*. On a subsequent examination of the votes in the hat, which was returned by McGregor, it appeared that of all the votes given, both before and after the hat was taken from the possession of the inspectors, the lowest candidate on the canal ticket had 42 majority over the highest on the other ticket, and 62 over any other candidate on that ticket.

The defendants claimed to be duly elected, and authorized to act as commissionera. They had made contracts for a part of the work on the canal; and had also made an assessment of \$26,500, to defray the expense of opening the canal, and were proceeding to collect the amount in the manner prescribed by the act, when McGregor and others filed their bill to restrain them from proceeding with the canal or to collect the assessment. The complainants alleged that the powers of the commissioners were at an end, by the neglect to elect in 1828; that they were not duly elected in 1829; and that they were wrongfully proceeding to drain the lands by the canal route, when that by the bed of the Wall Kill was the most proper and least expensive. An order having been granted for the defendants to show

cause why an injunction should not be granted, they now appeared to show cause and read their answer and several affidavits in opposition to the motion.

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A. Van Vechten and *S. J. Wilkin* for the complainants.

G. F. Tallman and *B. F. Butler* for the defendants.

*THE CHANCELLOR :—By the answer of the defendants, which has been read in opposition to this motion, it pretty satisfactorily appears that the defendants are, in good faith, pursuing the course, in draining the drowned lands, which they believe to be the best, and the least expensive to the owners or proprietors. The statute has committed that question to their decision, and unless they are exercising the right illegally, or unconscientiously, this court ought not to interfere, although the Chancellor might differ with them in opinion. This is not the proper tribunal to correct mere errors of judgment in officers entrusted with discretionary powers.

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But it is insisted, by the counsel for the complainants, that the power of the owners or proprietors of the drowned lands to elect commissioners and to proceed in the prosecution of this work, under the laws of 1807 and 1826, is at an end in consequence of their neglect to elect commissioners in 1828. And I shall now proceed to examine this question, without stopping to inquire whether the establishment of that proposition would furnish to the complainants any ground of relief in this court.

By the act of 1807, the commissioners, who were to be elected annually on the first Tuesday in June, were, during the year they should respectively be elected to act, to possess all the powers granted to the first commissioners. The peculiar phraseology of this statute seems to be inconsistent with the idea that they should hold over until others were elected in their stead. And were it not for the strong intimations to the contrary by some of the justices of the Su-

1829. preme Court in *The People v. Runkle*, (9 John. Rep. 147,) and *The Trustees of Vernon Society v. Hills*, (6 Cowen's Rep. 23,) under the act respecting religious incorporations, the language of which appears to be equally clear, I. should have supposed that the functions of these commissioners ceased at the end of the year for which they were elected. There are undoubtedly some common law officers who are to be elected or appointed periodically, but who, from the necessity of the case, continue to exercise their functions until others are *elected or appointed to fill their places. In the anonymous case, (12 Mod. Rep. 256,) it is said a constable is not discharged until his successor is appointed and sworn in; because the parish cannot be without an officer. There are many cases in the books relative to the magistrates of boroughs and other incorporated places; in some of which cases it has been decided that those officers held over, and in others that they did not. But I apprehend all these cases depended upon the peculiar provisions of their respective charters, and not upon any general principles of common law. In the case of *The Queen v. The Corporation of Durham*, (10 Mod. Rep. 146,) the court said the office of town clerk was an office for life, unless restrained by charter or proscription. And although by the custom of the borough he was to be elected annually, he might continue in office, and would do so, until another was chosen. But they said if the return had been that he was elected for one year only, his office would have expired at the end of the year, whether a successor had been appointed or not.

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In the case of *The Corporation of Tregony*, (8 Mod. Rep. 127,) the mayor was to be elected annually, but there was an express provision in the charter that he should hold over until another was duly elected. But in the *Banbury case*, (10 Mod. Rep. 346,) where there could be no election without the presence of the old mayor, who was not authorized by the charter to hold over, and the day prescribed was permitted to pass without an election, the corporation

was held to be dissolved. I am not aware of any general principle of the common law which authorizes all civil, or corporate officers to hold over after the expiration of the time for which they were elected, until their places are supplied by others; and the numerous statutes both here and in England giving such authority in express terms, seem wholly inconsistent with any such common law principle. But the question I am about to consider is entirely distinct from that which relates to the right of the old commissioners to hold over. It is not necessary to express any opinion on that point; or if they had not the right to inquire whether their acts were void, or only voidable.

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*The owners or proprietors of the drowned lands, under the act of 1807, are *quasi* a corporation; but the objects to be accomplished by the act can only be attained through the agency of the commissioners, who are to be elected annually. If the presence of the commissioners was necessary to the validity of an election, or any thing was to be done by them preparatory thereto, such as giving notice of the time and place, &c., there could be no election if the commissioners neglected to attend, or to give the requisite notice; *a fortiori* there could be no election if there were no commissioners in office; and in that case the powers granted by the act would be virtually at an end. But if the corporators have the power without the presence of their officers, or any act on their part, to assemble and choose officers to carry into effect the object of the law, their rights by a neglect to choose officers would be merely suspended. Although they may be forfeited by non-user or otherwise, they cannot be taken from them except by a direct proceeding, and judgment against them declaring the forfeiture.[1]

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If a corporation consists of several integral parts, and some of those are gone, and the remaining parts have no

[1] *See v. Bloom*, 5 John. Ch. 386; *S. C.*, 19 John. 456; *Brinckerhoff v. Brown*, 7 John. Ch. 217; *Blake v. Hinkle*, 10 Yerg. 218.

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power to supply the deficiency, the corporation is dissolved. As in the case in Rolle, (1 Roll. Abr. 514, I.,) where the corporation was to be composed of a certain number of brothers, and a certain number of sisters, and all the sisters were dead, and it was admitted that all grants and acts done by the brothers afterwards were void; for, after the sisters were dead, it was not a perfect corporation. But the case which is immediately afterwards stated by Rolle, shows that if the brothers had possessed the power to appoint other sisters in the place of those who were dead, the corporation might have been revived. So, Baron Comyn says, if a corporation refuses to continue the election of officers till all die who could make an election, the corporation is dissolved. (4 Com. Dig. 278, tit. *Franchises*, G. 4.)

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The incapacity to receive or resuscitate the powers of a corporation may arise from three causes; 1st. The absence of the necessary officers who are required to be present, when the deficiency is supplied, or their incapacity or neglect to do some act which is requisite to the validity of the *appointment; 2d. The want of the necessary corporators who are required to unite in the appointment; and 3d. The want of the proper persons from whom the appointment is to be made. The case of *The Corporation of Banbury*, before referred to, appears to be one of the first description. And the case cited from Rolle, and that put by Chief Baron Comyn, as well as *The King v. Passmore*, (3 Term Rep. 199,) and *The Corporation of Maidstone*, and *The Borough of Teverton*, referred to in that case, all appear to belong to the two last classes of cases. The statute 11 Geo. 1, ch. 4, (15 Stat. at Large, 178,) has provided for the first class of cases; but the sixth section of the act expressly excludes the second class, and no provision is made for cases of the third class. The result of an examination of all the cases on this subject is the principle so ably and successfully contended for by Serjeant East, in *The King v. Passmore*, that if the corporators have the power in themselves to supply the deficiency in their body, their rights are not extin-

guished, but only dormant. If however that power is gone, and they cannot act until the deficiency is supplied, the corporation is dissolved. In the language of Lord Mansfield, this is not a forfeiture for non-user, but is a consequence of law. "The corporation is dead, and not barely asleep."

Applying these principles to the case now under consideration, I am satisfied the powers of the owners or proprietors of the drowned lands, under the act of 1807, were not extinguished by their neglect to elect commissioners in 1828, whether the old commissioners held over or otherwise. The time and place for the annual meeting of the owners or proprietors is fixed by law. No act is required to be done by the commissioners, except to report their proceedings for the last year to the meeting; and if there were no commissioners, there could be no proceedings to report. The commissioners are not even required to preside at the meeting. There is nothing in the nature of the duties to be performed which necessarily requires a continued succession of commissioners. The officers of towns are required to be chosen by the people annually, at their several town meetings; yet *if a part of those officers should die before the expiration of the year, and the inhabitants of the town should, from any cause, neglect to hold their annual town meeting, it would not prevent them from supplying the vacancy at their next anniversary meeting for that purpose. The officers thus chosen would possess all the powers of their predecessors, in the same manner as if there had been an uninterrupted succession.

It, therefore, becomes necessary to examine as to the regularity of the election in 1829. The first question which presents itself on this point is as to the right to vote by proxy. This point does not necessarily arise in the case, because from the bill and answer it appears that if all the proxies had been admitted the defendants would have had a still larger majority of the votes. The proxies actually held by them were 94, while those held by McGregor

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were only 26. I lay out of question the 82 votes, which the latter claimed the right to give as the agent of his uncle, because he never had from him any specific power to vote on the property; and what is conclusive on that point, because the uncle had been dead for several months before the election, although the fact was not known at the time; and by the bill it appears McGregor had no authority whatever from the heirs or devisees. But as it may prevent future contest on this point, it may be proper to express an opinion thereon.

The right of voting by proxy is not a general right, and the party who claims it must show a special authority for that purpose. The only case in which it is allowable, at the common law, is by the peers of England, and that is said to be in virtue of a special permission of the king. And it is possible that it might be delegated in some cases by the by-laws of a corporation, where express authority was given to make such by-laws, regulating the manner of voting. I am not aware of any other case in which the right was ever claimed; and the express power which is generally given to the stockholders of moneyed and other private corporations is opposed to the claims in this case, where there is no express or implied power contained in the act. I, therefore, think the decision of the inspectors correct, in rejecting the votes offered under the proxies.

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*The claim of McGregor to the vote on the 2,000 acres is equally untenable. If his name had been contained on the original assessment roll as the owner of this tract, it would have presented a different question. In that case the roll itself would have been the evidence of his right. But it is evident the legislature intended to give the right of voting to the owners of the lands in the ordinary acceptation of the term; which implies an ownership in fee. From the latter part of the eighth section of the act, it is evident the legislature intended to use the terms owner and proprietor in the same sense. The owner or proprietor is there authorized to give one vote for every ten acres assessed

to him on the roll, and one vote for every twenty acres he may own above that quantity, &c. The 2,000 acres in question were originally entered on the roll as the property of an individual, in fee. From him it has since been conveyed to the uncle of McGregor. Whether under such circumstances, if particular estates were carved out of the property, it would be necessary for the owners of the several estates to unite for the purpose of voting thereon, it is not necessary now to decide; but a mere tenant for years, or one who has taken the property on shares, and has no substantial interest therein, cannot exercise this right without the concurrence of the real owner of the property. The assessments are not a personal charge upon the owners or proprietors; and if not paid can only be collected by a sale of the land. The owner of the inheritance is therefore the person who is principally interested in the election of commissioners, as the expense of the improvements must fall on his estate in the premises.

By the bill it appears that the votes which were in the hat before it was taken by McGregor were restored to the inspectors, without addition or alteration. And by the answer and affidavits on the part of the defendants, it appears that they had a majority of all the votes including those taken by McGregor. Under such circumstances, it does not lie in his mouth to say the election was illegal or irregularly conducted. If he could not set up the irregularity, on a bill filed by him as the sole complainant, he cannot do it by uniting with others. If they wished to take advantage of such an irregularity, they should have filed their bill and made him a party defendant. And in such a case if the complainants had succeeded, the court would have punished him by compelling him to pay the costs which had been incurred in consequence of his misconduct. But there was no irregularity in this case sufficient to avoid the election. The statute has prescribed no form to be observed, and the only questions are, whether all who had the right and wished to vote have been permitted to exer-

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cise that privilege, and whether the present commissioners were the choice of a majority of the voters. Of this there can be no doubt. The mode of conducting the election by the appointment of inspectors, and a public canvass of the votes in the presence of the electors, as heretofore pursued, was a proper mode of proceeding, and ought not to be departed from without cause. If a different course had been adopted without any sufficient reason, and there had been doubt as to the result or the fairness of the election, the same would have been set aside by the proper tribunal.

Although the inspectors may have erred in not commencing the canvass anew, after the outrage of McGregor, so that the election would be void if the number of votes previously taken had not been ascertained, yet there can be no suspicion of the *bona fides* of the transaction on their part. And the fact of the defendants' election, by the majority of the voters, being now ascertained, there can be no pretence for setting aside the election. As many of the electors had left the court house before the outrage was committed, the course pursued, as it resulted, showed more clearly the wishes of the majority than could have appeared appeared by commencing *de novo*.

A proceeding *de novo* after part of the electors had voted, and when they were absent, could only have been justified by the necessity of the case.

Having arrived at the conclusion that the power of the commissioners under the act is not at an end, by the neglect of the owners and proprietors to elect in 1828, and that the defendants were duly elected in 1829, it becomes unnecessary for me to examine the question as to the right of this court to stay the proceedings of the commissioners if they

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*were unduly elected; or as to the propriety of granting a preliminary injunction under the circumstances stated in the bill.

The rule to show cause why an injunction should not issue must be discharged with costs to be paid by the complainants.

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IN THE MATTER OF ISAAC L. KIP.

Under the act to perpetuate the testimony of witnesses, (1 R. L. 454,) a witness is bound to give evidence in the same cases and to the same extent that he would be, were he called as a witness upon the trial of the cause. The act does not authorize the examination of a witness who could not be compelled to testify upon the trial.

No witness is bound to answer a question, which would either criminate himself, render him infamous, or subject him to a penalty or forfeiture.

A witness who is neither a nominal nor real party to the suit, is not excused from giving evidence, although his testimony might be used against him in a civil suit; unless it will subject him to some loss or disadvantage in the nature of a penalty or forfeiture.

In a suit by or against a corporation, one of the corporators is not so far a party to the suit as to be excused from testifying against the corporation.

The answer of a corporator to a bill of discovery cannot be read in evidence against the corporation.

The declarations of corporators, although officers of the corporation, are not evidence against the corporation.

Corporators who have no personal interest in the controversy are competent witnesses in favor of the corporation.

ON the 19th of August, 1829, an order of this court was Sept. 7th. made directing a *habeas corpus* to be issued to the sheriff of New York to bring up the body of Isaac L. Kip, then in his custody, under an order of commitment made by Thomas Bolton, a master in Chancery; which writ was thereupon issued, returnable in this court on Tuesday the 25th of August, at the capitol in the city of Albany. By the sheriff's return, the report of Master Bolton and other affidavits and documents produced before the court, it appeared that L. L. Van Kleeck made oath before the master that an action of ejectment commenced by him in the Supreme Court against the minister, elders and deacons of the reformed Protestant Dutch Church in the city of New York and Cornelia Strong, and another action against the same corporation and E. and S. S. *Rockwell, affected the title of lands lying in the city and county of New York; that the testimony of Isaac L. Kip was material and neces-

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sary in the prosecution of such suits; and he applied for his examination before the master pursuant to the provisions of the act to perpetuate the testimony of witnesses, (1 Rev. Laws, 454.) The master made an order for the examination of Kip, and assigned a time and place for that purpose, of which due notice was given to the defendants in the ejectment suits; and the witness was summoned to attend accordingly. Kip appeared before the master, but declined testifying, on the ground that he was the treasurer and one of the corporators of the Dutch Church in the city of New York, and that he was also a pew holder in two churches which were on lands the title whereof depended upon the same questions which arose in those causes. These facts were not disputed by Van Kleeck's counsel, who still insisted upon his right to perpetuate the testimony of the witness in these suits. The master decided that Kip was bound to testify, notwithstanding his objection; and on his refusal to be sworn, the master issued warrants for his commitment in pursuance of the provisions of the act.

J. Duer for L. Kip:—Kip, as a corporator, being a party in interest to the ejectment suits, and being directly interested in their event, was privileged from examination before the master. The corporators of the Dutch Church in New York, for the time being, are as much parties in interest as if sued in their private names. The whole doctrine of corporations has been mistified by a jargon of definitions. The true definition of a corporation is, that it is an association of natural persons for certain purposes. If the corporators of a corporation aggregate die or cease to exist, the corporation is dissolved. Courts have a right to inquire into the rights and character of the private individuals composing a corporation. In England the inhabitants of a parish which is a corporation are made liable for the support of the poor and the repair of highways. The judiciary act of Congress speaks of citizens of differen

states being parties to a suit; and no statute expressly gives jurisdiction to the federal courts over *corporations. In the Matter of Kip. 1829.

And it was contended, in the suit of *The Bank of the United States v. Devaux*, (5 Cranch, 61, 92,) that a corporation was not a citizen of a state, and that, therefore, the court had no jurisdiction of the cause. But the court decided that the real parties to the suit were the corporators, who were citizens, and that, therefore, the court had jurisdiction. In the suit of *The Washington Ins. Co. of the city of New York v. Price*, (1 Hopk. 1,) the Chancellor decided that a stockholder of that corporation was a party to the suit. The question here is as to the privilege of a witness, and not his competency. A member of a corporation was always excused from testifying against the corporation if he claimed his privilege. Kip has a personal interest in the ejectment suits. In the suit of *Mauran v. Lamb*, (7 Cowen, 174,) the real party, though not named in the record, was allowed his privilege. (*People v. Irving* 1 Wendell, 20.) In *King v. Inhabitants of Woburn*, (10 East's Rep. 395,) it was held that a rateable inhabitant, although not a nominal party to the appeal, was entitled to his privilege if he claimed it on account of interest, and that he could not be compelled to give evidence for the adverse party. In the charter of the Dutch Church, there is a clause authorizing an assessment to be made upon the members of the church for all expenses either in support of the minister or otherwise. In this case Kip has a personal interest. If examined he may be subjected to a civil suit. This is an attempt at a discovery, which could not be obtained by a bill of discovery. Kip is an officer of the corporation, and has possession of the title deeds. If a bill had been filed against the officers of the corporation, they could not have been compelled to disclose the evidence here sought after.

L. H. Palmer, contra:—If Kip is such a party to the ejectment suits as to render his declarations admissible evi-

1829. In the Matter of Kip. dence against the corporation, then he is privileged from examination as a witness. At the time the charter of this church was granted, there were religious difficulties in the colony of New York. The Church of England had been long established; and it was deemed important to obtain a charter for the *Dutch Church different from those of the Church of England. The declaration in the charter of the former, that communicants should be members of the church, only conferred upon them the immunities and privileges of the church, analagous to those enjoyed by the citizens of New York and Albany as members of the corporations of those cities. The provisions in the charter subjecting the members of the church to an assessment have been repealed. (1 R. L. 67, Greenleaf's ed. ch. 9, sect. 2 & 7.) No general rules can be laid down as to the competency of corporators as witnesses for or against the corporation. Each case must be governed by its peculiar circumstances. Corporations are divisible into two general classes: 1. Public and general corporations, such as colleges, towns, cities, &c.; 2. Private corporations, such as banking companies, &c. In the former class of corporations, the officers and members have no personal interest in the funds and property of the corporation. In private corporations the funds and property belong to the stockholders. The members of public corporations are admissible as witnesses for or against the corporation; for they do not testify for or against themselves as individuals. The rule appears to be, that where members of a corporation cannot derive any private advantage from the subject matter of the controversy, which concerns the public only, they are admissible as witnesses. (2 Stark. Ev. part 4, p. 427.) The decisions upon the subject of admitting corporators as witnesses have been founded upon the distinction between public and private corporations; (*Hope Ins. Co. of Providence v. Boardman*, 5 Cranch. 57.) An interest to exclude a witness must be positive certain and direct. Where a corporation will only be direct loser, and not the corporators, the interest of the lat-

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ter is too remote to exclude them as witnesses for or against the corporation; (*Locke v. The North American Ins. Co.*, 18 Mass. Rep. 61.) In private corporations the members are the owners of the corporate property, and are directly interested in the event of a suit in which the corporation is a party. The Dutch Church of New York is a public corporation, created for public purposes, and the corporators have no personal *interest in its corporate property. If the corporation was dissolved, the property would not belong to the corporators; (*People v. Runkle*, 8 John. R. 368, Peak's N. P. Cases, 153; 2 Star. pt. 4, p. 427, tit. *Corporation*; *King v. Inhabitants of Hardwick*, 11 East, 578; *State of Connecticut v. Bradish*, 14 Mass. R. 296; 12 John. R. 285; *Drummer v. Corporation of Chippenham*, 14 Ves. 252; *Falls v. Belknap*, 1 John. R. 491; Swift's Ev. 57; *Waring v. Catawba Co.*, 2 Bay's Rep. 109; *Rex v. Prosser*, 4 T. R. 17; *King v. The Inhabitants of Little Lumley*, 6 T. R. 157; *King v. Inhabitants of Woburn*, 10 East's Rep. 395; *King v. Inhabitants of Whitley Lower*, 1 Maule & Selw. 636; *Jackson v. Van Duzen*, 5 John. R. 144; *Gilpin v. Vincent*, 9 John. 219; *Meredith v. Gilpin*, 6 Price, 146; *Jackson v. Inhabitants of Netherthong*, 2 Maule & Selw. 387, 8.) In *Nason v. Thatcher*, (7 Mass. Rep. 398,) corporators were received as witnesses in a suit between the heir and executor, although the corporation was made the residuary legatee by the will of the testator. An inhabitant of the state has been decided to be a competent witness in a suit where the state is a party; (*State of Connecticut v. Bradish*, 14 Mass. Rep. 296.) A member of a corporation may sue the corporation; (*Waring v. Catawba Co.*, 2 Bay's Rep. 109.) Inhabitants of parishes in England have been admitted as witnesses in a suit concerning land in which the parish was interested; (*Meredith v. Gilpin*, 6 Price, 146.) And a parishioner, although liable to be rated, if not actually rated, is a competent witness for or against his parish; (*Rex v. Prosser*, 4 T. R. 17.) In the present case Kip is not directly interested in the ejectment suits. His release would

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1829. not be of any avail. His interest in the corporate property
 In the Matter of Kip. will not descend to his heirs. It cannot be assigned to any other communicant. He cannot defend as landlord. He is not personally liable for costs or mesne profits; (*First Parish in Brunswick v. Dunning*, 7 Mass. Rep. 445; *Nason v. Thatcher*, 7 id. 398; *People v. Runkle*, 8 John. R. 363; *Gilpin v. Vincent*, 9 John. 219.) An officer in a corporation can be compelled to testify against the corporation. He is not exempted or prohibited from testifying by the policy of the law. This exemption and *prohibition extends only to the case of man and wife and attorney and client. (1 Starkie's Ev. pt. 1, p. 103, 4, sect. 76, 78; 2 id. pt. 4, p. 396, 399, and notes.) An attorney may be compelled to testify that he has a deed in possession, entrusted to him by his client; (*Brandt v. Klein*, 17 John. R. 335; *Jackson v. Mc Vey*, 18 John. 330.)

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A. Van Vechten, in reply :—The minister, elders and deacons of the Dutch Church in New York are the agents of the corporation. The charter of that church was granted for the benefit of the corporators, who are the persons beneficially interested. Kip is substantially a party to the ejectment suits, although not so *eo nomine*. But the corporate name includes him by legal construction. The object of the statute to perpetuate testimony was to preserve evidence which might be lost by the lapse of time. The intention of the act was not to allow a party to fish for testimony. He ought to lay his finger upon the point to be proved. If it should turn out to be a fishing examination, a strict hand ought to be held over it. The examination in this case is one of this character. A church is a corporation very unlike that of a college. Suppose, as is frequently the case, property is given to the members of a church, who are afterwards incorporated, the corporators will most clearly have a personal interest in the corporate property. The provision in the Revised Statutes authorizing the admission of corporators as witnesses to testify

against the interest of the corporation, proves that it is a doubtful question whether they can now be received as such witnesses. Kip is the treasurer of the church, and as such treasurer has the custody of their title deeds. Parol proof could not upon trial be given of their contents, unless notice to produce them had been served. Here Kip was required to testify in relation to them without the service of any such notice; which testimony was to be used upon the trial, in the event the deeds were not then produced. It is not true that, in order to entitle a party in interest to the privilege of refusing to testify, his admissions must be evidence against the opposite party. Co-tenants may generally be witnesses for each other; but if *there was a survivorship of interest between them, they would be privileged from answering questions which would destroy their title. As to the interest of Kip, the only question is, is it an existing interest, and not whether it be alienable or descendible. But the interest of Kip in the pews is both alienable and descendible. A communicant by joining a church subjects himself to its rules, and he cannot abandon the church without its consent. If he does, he is an undutiful member, and becomes obnoxious to its reproaches. Charity should induce the belief that his Christian faith does not depend upon and is not affected by his temporal interest.

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THE CHANCELLOR:—By the act under which these proceedings were instituted, it was the intention of the legislature to give to the master or other officer power to take testimony and to compel the witnesses to give evidence in the same cases and to the same extent that the court would be authorized to compel the witness to testify on the trial of the cause.[1] It does not authorize the examination of a witness who would not be compelled to testify on the trial. The witness is not obliged to criminate himself, or answer any question which he would not be bound to answer if examined in open court. The provision in the second sec-

[1] 2 R. S. (4th ed.) 647, sec. 60.

1829. tion of the act, (1 Rev. Laws, 455,) that the officer shall include in the deposition any answer or declaration of the witness which shall be required to be included by either party, does not deprive the officer of all discretion in deciding whether the witness shall be compelled to answer the question proposed. The legislature never intended to establish an inquisition, by which witnesses should be compelled to criminate themselves, or to disclose secrets in which the parties to the examination had no interest. But as it is impossible for the officer to understand the precise bearing the testimony will have on the cause, it is made his duty, if the witness consents to answer the question proposed, to insert such answer in the deposition, leaving the relevancy or materiality of the testimony to be decided upon by the court before whom the cause is tried. If the testimony is calculated to criminate the witness, render him infamous, or to subject him to a penalty or forfeiture, the officer has no right to compel him to testify.[1] So *if the master is satisfied the testimony can have no possible bearing upon the questions which may arise in the cause, he ought not to compel the witness to answer, especially where a reasonable objection is urged by him. The officer must necessarily have some discretion on this subject, and he may require the party on whose application the examination is made to explain the nature of the litigation, so far as to enable him to judge whether such applicant is proceeding in good faith to perpetuate testimony against the adverse party, or is, under that pretence, only fishing for testimony to be used against the witness, or for other purposes. On this subject the officer must be permitted to judge; and he is not compelled to commit the witness for refusing to answer, if he thinks the question ought not to be answered. If the answer to a question cannot injure or prejudice the witness, the officer should require and com-

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[1] See *Southard v. Razford*, 6 Cow. 254, 259; *People v. Mather*, 4 Wm. 229, 250, 251; *United States v. Burr*, 1 Rob. 207, 8, 242 to 245; see also 2 Cow. & Hill's Notes to Phil. Ev. 736-746.

pel him to testify, unless he is satisfied the evidence could not have any possible bearing upon the subject in controversy. 1879.
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By the charter of the Dutch Church in New York, granted in 1696, and confirmed by the act of the 17th of March, 1784, (1 Greenl. ed. of laws, 67,) the minister, elders and deacons, and all other communicants of that church, and their successors, are corporators, under the name or style of "The Minister, Elders and Deacons of the Reformed Protestant Dutch Church in the city of New York." The witness is a corporator and also an officer of the corporation. Although he may not have any personal interest in the suits now commenced, he has an interest in the question to which it is proposed to examine him before the master; as the title to the churches in which he is a pew owner, depends on the same question substantially as that which arises in the present suits. The questions to be decided in this case are:

1st. Is a witness compelled to testify to matters relevant to the issue, in a cause to which he is not a party, when his answers will subject him to a civil suit; or may be used against him in a suit in which he is interested?

2d. Is a member of a corporation aggregate so far a party to a suit brought by or against the corporation as to excuse *the corporator from giving testimony in favor of the adverse party?

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Both of these questions have been frequently agitated in the courts of this country and of England, and the decisions in relation thereto have not been uniform. Another question has often been raised, as to how far, and in what cases, corporators may be witnesses in behalf of the corporation; but that question does not arise here.

It was once doubted in England whether a witness could be compelled to answer any question where the answer might subject him to a civil suit, or charge him with a debt. Two *nisi prius* decisions of Lord Kenyon, and a *dictum* of Chief Justice Pratt are referred to by Peake, to

1839. show that a witness is not bound to answer under such circumstances. (Peake's Ev. 184.) By referring to Peake's
 In the Matter of Kip. note of the case of *Bain v. Hargrave*, it will be seen that the question put to the witness was not relevant to the cause then on trial, and was only intended to ascertain whether the witnesses did not owe money to the plaintiff. Lord Kenyon said he would not compel the witness to answer any question which might tend to charge himself with the debt.[1] And in *Raines v. Towgood*, also referred to by Peake, the witness was excused from answering the question, as his answer might subject him to a penalty of 500*l*. under the act to prevent stock jobbing. In the case before Chief Justice Pratt, (1 Strange, 406,) the witness was compelled to answer, although it went against his interest; but the chief justice intimated that he would not have compelled an answer under other circumstances. And in *Tille v. Grevett*, (2 Lord Raymond, 1008,) Holt, Chief Justice, said a man who had conveyed land might be a witness to prove he had no title, for he testified against himself, but he was not compelled to testify. The loose *dicta* in the two last cases, and those two *nisi prius* decisions of Lord Kenyon, are all the authorities relied on by Peake, to support this position; and it is remarkable that the case of *Bain v. Hargrave*, the only one in which the question is said to have been raised, is contradicted on the authority of Lord Chancellor Erskine, (1 Hall's Law, I. 230.) He says that for 27 years he had not been prevented from attending the courts by *any indisposition or bodily infirmity, and during all that time he never knew the objection taken that the answer to an interrogatory would render the witness responsible in a civil suit; that he was counsel in the cause stated in Peake's note, but had no recollection that any such decision was made. In 1806, this question came before the House of Lords in consequence of the proceedings in Lord

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[1] In New York a witness cannot refuse to answer any question on the ground that it will subject him to a civil suit. 2 R. S. (4th ed.) 652, sec. 101, *Cook v. Spalding*, 1 Hill 588.

Melvill's case, and the opinion of the twelve judges was required thereon. Their opinions are briefly alluded to in a note to the last London edition of Phillips' Evidence, (1 Phil. Ev. ed. of 1829, p. 272, n.) Four judges were of opinion that the witness was not bound to answer. The other eight judges were of the contrary opinion; and in which they were supported by Lord Eldon and Lord Chancellor Erskine. I think these opinions, supported as they are by that of Lord Mansfield, are conclusive to show that in England a witness, who is neither nominally or substantially a party to the suit, is bound to answer any question pertinent to the issue, where his answer will not criminate himself, or subject him to a penalty, or to some loss or injury which is in the nature of a penalty or forfeiture. (See 1 Hall's Law, I. 223.) In consequence of the difference of opinion among the English judges, an act was passed declaring the law to be in accordance with the opinion of the eight judges and of the Lord Chancellor and Lord Eldon. (Statutes at Large, May, 1806.)

The same question has frequently been agitated in this country, and the decisions in the different states have not been uniform. In most of the states where the question has been raised, the witness has been compelled to testify. In Connecticut it has been decided that the witness was not compellable to testify against his own interest. (2 Root's Rep. 406, 528; 3 Conn. Rep. 528; Kirby's Rep. 208.) A similar decision was made in the state of Tennessee, (*Cook v. Corn*, 1 Overton's Rep. 340.) In Pennsylvania, Maryland, Kentucky and Louisiana, it is settled that a witness is bound to answer a question pertinent to the issue, although such answer may subject him to a civil suit. (*Baird v. Cochran*, 4 Serg. & Rawle, 397; *Taney v. Kemp*, 4 Harris & John. 348; *Gorham v. Carrol*, 3 Little's Rep. 221; *The Planter's Bank v. George*, 6 Martin's Rep. 670.) Derbigny, J., who delivered the opinion of the court in the last case, says their decision is not founded on the ancient law of Louisiana on that subject, which was abrogated by

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1829. the establishment of a free government, instead of the despotism by which the country had previously been governed. But he founds the decisions of the court upon the principles recognized in those countries where liberty directs the administration of justice; and he refers to the opinions of the English judges and Chancellor on Lord Melvill's witness and indemnity bill. In the case of *The Executor of Hawkins v. Stumpter*, (4 Dessaus. Rep. 108, 446,) the Court of Chancery of South Carolina compelled a witness, on a subpoena *duces tecum*, to produce books in his possession, although he alleged that their production would enable parties to recover against him, as the bail for a deceased sheriff, whose estate was insolvent; and this decision was affirmed on appeal. In *Appleton v. Boyd*, (7 Mass. Rep. 131,) the Supreme Court of Massachusetts refused to compel a witness who was jointly interested in the event of the suit, as the partner of the plaintiff, to give testimony against his interest. But on examination of that case, it will be found perfectly consistent with the opinion of the majority of the judges in Lord Melvill's case; for the object of the defendant was to establish the defence of usury; which was in the nature of a penalty or forfeiture. The case of *Mauran v. Lamb*, in the Supreme Court of this state, (7 Cowen's Rep. 174,) was a similar attempt by the defendant, to establish a defence of usury by the testimony of the real plaintiff in the suit; where the action was nominally in the name of another person, but for her sole benefit. On no principle therefore could she be compelled to testify to facts which would subject her to a forfeiture and defeat her action. The question now under discussion was not intended to be decided in that case.

Upon a full examination of all the authorities on this subject to which I have been referred, or which I have been able to obtain by my own researches, I have arrived at the conclusion, that a witness, who is neither nominally nor substantially a party to the suit, is not exempted from giving evidence, *although that evidence may be used against

him in a civil suit, unless the disclosure will subject him to some loss or disadvantage in the nature of a penalty or forfeiture. If the party to whom the witness makes himself responsible by his testimony could, by a bill of discovery, obtain the same disclosure to be used directly against the witness himself, it would be unjust to deprive such party of the benefit of the testimony against a third person. In such a case the answer of the witness to a bill of discovery could not be read in evidence in a suit against the third person; and the only way to obtain the testimony is to examine the interested person as a witness.

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The conclusion at which I have arrived on the first point, renders it necessary to examine the question whether Kip is so far a party to the suits as to excuse him from testifying. In other words, could his answer to a bill of discovery be read in evidence against the corporation of which he is a member? The case of *The King v. The Inhabitants of Woburn*, (10 East's Rep. 395,) is relied upon to show that corporators are the real parties to the suit, and are excused from giving testimony against the corporation. That was not a proceeding against a corporation, and the witness was not excused on the ground that he was a corporator. It was a proceeding under the English poor laws, where the appeal is carried on by the inhabitants of the parish in the names of their officers. The costs of the suit, and other expenses of the pauper, are charged upon the inhabitants, actually rated in proportion to their property. They are the real parties, and the expense falls directly upon them. In that case, Le Blanc, Justice, says, "If the sessions had been aware, at the time, of the extent of the question, there would have been no difficulty; for if the witness was rejected on the ground of his being a party to the suit, his declaration of any facts touching the matter in issue would necessarily have been evidence against him." And in the case of *The King v. The Inhabitants of Hardwick*, (11 East, 578,) the same court decided that the rated inhabitants were the real parties to the appeal, and that the declaration

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of a rated inhabitant of one parish might be given in evidence in favor of the adverse parish. *These cases do not, therefore, depend upon the principles applicable to incorporations, as the declarations of corporators, even officers of a corporation, are not evidence. (*Hartford Bank v. Hart*, 8 Day's Rep. 491; *Magill v. Kauffman*, 4 Serg. & Rawle, 817.) In the *Bank of the United States v. Deveaux*, (5 Cranch, 61,) the Supreme Court of the United States decided that the corporators, and not the corporation, were to be considered the parties, in determining the question of jurisdiction; and that an averment that the complainants were citizens of Pennsylvania, was an allegation that all the stockholders of the bank were citizens of that state. But in the case of *The Bank of the United States v. The Planters' Bank of Georgia*, (9 Wheaton, 904,) they decided that the corporation could be sued in the United States' courts, although a sovereign state, which could not be sued, was one of the corporators. These cases depended upon the construction of the constitution and laws of the United States, in relation to the jurisdiction of the federal courts. Even on that question the judges were not unanimous; but they exemplify the principle, that in a case of doubt a good judge always decides in favor of his own jurisdiction. Neither of these decisions had any reference to the question whether the corporators were to be considered parties to the record so far as to prevent their being witnesses. I believe it is now the practice of all courts to admit corporators to testify in behalf of the corporation where they have no personal interest in the controversy; and against the corporation where the witness does not object. But they are excluded from testifying where they have a direct personal interest in favor of the party calling them, in virtue of the corporation or otherwise. The freemen of our cities are corporators, and have an indirect interest in almost every suit brought by the corporation. But they are admitted as competent witnesses, and are even permitted by statute to serve as jurors, which certainly could not be allowed if

they were considered parties to the suit; as it is a universal rule of natural law that no man shall be a judge in his own case; and jurors are judges of the facts. In the case under consideration, it is even doubtful whether the members of the Dutch Church *have such a direct interest in this controversy as to render them incompetent witnesses for the corporation. The only case which I have been able to find in which the precise question now presented has been decided, is *The City Bank of Baltimore v. Bateman*, (7 Har. & John. 104.) In that case the Court of Appeals in Maryland decided that the president of a moneyed corporation, who was a stockholder therein, might be called as a witness for the adverse party, and compelled to testify against his interest. An express provision to that effect is made in the late revision of the laws in this state, (2 Rev. Stat. 405, 407.) The note to this provision, in the report of the revisors is, that it is intended as declaratory of the rule believed to exist, but sometimes questioned. (Revisors' Rep. pt. 3, ch. 7, tit. 3, sect. 96.) The notes of the revisors are not considered as authorities settling what the law previously was; but they may properly be referred to for the purpose of showing that a particular section was not introduced by them into the statutes as containing a new principle.

It was suggested by the counsel for the corporation that the evidence sought from this witness might be obtained by a bill of discovery; but if I am correct in supposing the declaration of the corporator would not be evidence against the corporation, I apprehend his answer to such a bill could not be read in evidence against them. (*Vermilyea v. The Fullon Bank*, 1 Paige's Rep. 87.)

I think the witness was not so far a party to the suits in this case as to excuse him from testifying. The master was therefore right in requiring him to testify notwithstanding his objection. He was legally and properly committed for refusing to be sworn and give evidence in relation to the subject matter of those suits; and he must be remanded to

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Stilwell	until he submits to be sworn and give evidence to be used
v.	in those suits.
Van Epps.	

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While the plaintiff has the body of the defendant in execution on a *ca. sa.*, his right to proceed against the property of the latter is suspended. He cannot therefore, as long as the defendant is so in custody, file a bill in Chancery to reach his equitable estate.

An assignment by a debtor under the insolvent act transfers all his estate to the assignee, for the benefit of his creditors generally; and a judgment creditor can gain no preference in relation to such property, by a bill subsequently filed in this court.

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THE bill in this cause was filed by judgment creditors of H. V. D. Van Epps, one of the defendants, after their *fi. fa.* against him had been returned unsatisfied, for the purpose of reaching a fund in court alleged to have been fraudulently assigned by him to the other defendant. The defendant H. V. D. Van Epps put in a plea setting forth the fact that, previous to the filing of the bill, the complainants had caused him to be arrested on a *ca. sa.*, on which he still remained in custody. The cause was brought to a hearing on the plea. The complainants also presented a petition setting forth that since the plea was put in, H. V. D. Van Epps had been discharged from custody under the non-imprisonment act, and had assigned all his property to Evert Van Epps under the act, but that the fund in court was not embraced in his inventory. They, therefore, asked leave to file a supplemental bill setting forth these facts, and to make the assignee a party.

J. King for the complainants.

J. N. Cushman for the defendants.

THE CHANCELLOR:—The complainants having taken the body of their debtor in execution, could not proceed against his property at law while he remained in custody. (*Horn v. Horn*, Ambl. R. 79; *Jackson v. Benedict*, 13 John. R. 532.) The bill filed in this court to reach the equitable assets of the debtor is merely in aid of the legal remedy, and that remedy being at an end, or at least suspended, by the voluntary act *of the complainants at the time they filed their bill, this suit cannot be sustained. The plea must, therefore, be allowed.

A supplemental bill will not aid the complainants, because they commenced this suit when they were not entitled to any kind of equitable relief; and the subsequent assignment under the insolvent act has transferred all the interest of their debtor to the assignee for the benefit of the creditors generally.[1] (*Candler v. Pettit*, 1 Paige's Rep. 168.) The application for leave to file a supplemental bill is denied with costs.

[1] See 2 R. S. (4th ed.) 203, sec. 33; *Bailey v. Burton*, 8 Wen. 348. Property fraudulently conveyed by an insolvent debtor prior to his discharge, passes to the assignees, although not mentioned in the inventory. *Ward v. Van Bokkelen*, 2 Paige, 289; *Roseboom v. Mosher*, 2 Denio, 61.

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Wood
v.
Executors of
Riker.

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WOOD AND WIFE v. THE EXECUTORS OF RIKER.

Where a legacy to a daughter was payable on her marriage or when she became of age, and she married before arriving at full age, in a suit brought by her and her husband for the legacy, after the lapse of six years it was held that the statute of limitations did not run against her, she coming within the exception in the statute in favor of *femes covert*.

Where the statute of limitations is a good defence to only a part of the complainants' demand, if pleaded as a bar to the whole, the plea will be bar.

THE intestate, G. Riker, was the testamentary guardian of the complainant, Phebe Ann Wood, and the surviving

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1829. <hr/> Wood v. Executors of Riker.	executor of her father's will. Her share of the estate was to be paid when she became of age, or was married. Previous to her marriage, the guardian received \$500 in satisfaction for an assault committed upon her. She married Wood in 1819, and became of age in July, 1821. Riker died in September, 1827, and in 1829, the bill in this case was filed against his executors for an account and payment of Mrs. Wood's share of the estate, and of the money received upon the compromise for the assault and battery. The executors put in a plea of the statute of limitations.
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L. Jenkins for complainants.

P. A. Jay for defendants.

[*617] *THE CHANCELLOR:—The right of Mrs. Wood to a share of her father's estate did not accrue till after her marriage, which brings this case within the exception contained in the statute in favor of *femes covert*. It does not appear when the \$500 which was received by Riker as guardian, was paid to him. As to that, he was bound to account when she became of age. The statute would not commence running until the expiration of his trust, even if it can be considered a bar in any case of a direct trust. If the statute of limitations was a good defence to one part of the complainant's demand, it is not properly pleaded as a bar to the whole. As Mrs. Wood was both an infant and *feme covert*, and the latter disability still continues, the plea is bad in substance.

It must be overruled with costs; and the defendants must answer the bill and pay the costs within twenty days after service of a copy of this decree.

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v.
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BROCKWAY IMPEADED WITH BERRY, APPELLANT v.
WELLS, RESPONDENT.

An assignment of a land contract for the security of a debt due the assignee upon the condition, that if the debt was paid at the time stipulated, the assignee should re-assign the contract, is, in equity, a mortgage, and the assignor has a right of redemption.

As a general rule, a mortgagor pays costs to the defendant, on a bill to redeem, although he is successful; but if the defendant has been guilty of improper conduct, he will be deprived of costs, and in some cases will be compelled to pay costs.

If a mortgagor, who is entitled to redeem, applies before filing his bill to the mortgagee for that purpose, and the latter refuses to allow him to redeem, the mortgagee will not only be deprived of costs, but may be compelled to pay costs to the complainant.

THIS was an appeal from the decree of the equity court October 6th. of the eighth circuit. Wells assigned to Brockway a land contract, to secure the payment of \$97 98. The assignment contained a condition that if Wells paid Brockway \$25 on the first of February, 1821 and \$72 98 on the 21st of November thereafter, the latter should re-assign the contract to *Wells, otherwise not. A part of the amount was paid within the specified time, but a part thereof remained unpaid. After various ineffectual negotiations and attempts to obtain payment of the amount due, Brockway sold the account to Berry, who afterwards took out a new contract in his own name from the Holland Land Company. Wells then filed his bill in this cause against Brockway and Berry, praying a redemption, and for general relief. The defendants having put in their answers, and replications having been filed to the same, many witnesses were examined as to the value of the premises, and the various dealings and negotiations between the parties. The cause was heard on pleadings and proofs, and the circuit judge decreed a dismissal of the bill against the defendant Berry, without costs: and that Brockway should pay to the complainant

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\$160, for the proceeds of the sale of the premises, over and above the balance due from the complainant to him of the original debt. He also decreed costs against the defendant Brockway. From that decree the latter appealed to this court.

F. M. Haight for the appellant.

P. L. Tracy for the respondent.

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THE CHANCELLOR:—The assignment of the land contract in this case was given for the security of a debt and was therefore a mortgage. There does not appear to have been any agreement to receive it in full satisfaction of the debt at any time; and there can be no doubt of the right of the complainant to redeem. The assignment by way of mortgage in this case being of an interest in real estate, must be governed by the rules which are applicable to a mortgage of the legal estate. It is a mortgage of an equitable interest in the land mentioned in the contract. This court has jurisdiction in such a case to decree a redemption. Although there was probably in this case sufficient to put the other defendant on inquiry, if he did not actually know that this assignment was nothing but a mortgage, so as to authorize the complainant to claim a redemption against him, the circuit judge has thought otherwise and considered him a *bona fide* purchaser *without notice. There is no appeal from that part of the decree, and it cannot therefore be reviewed here. In such cases the equity of redemption instead of remaining an incumbrance on the land in the hands of the *bona fide* purchaser, attaches upon the money received by the mortgagee on the sale; (*Whitlick v. Kane*, 1 Paige's Rep. 202.) The decree in this case was therefore right in directing the payment of the balance received by the mortgagee on the sale of the land, over and above his debt, if the land could not be redeemed.

But the appellant contends that the equity court has erred

in awarding costs against him on his bill for a redemption of the mortgage. As a general rule the complainant pays costs to the defendant on a bill to redeem, although he ultimately succeeds in obtaining the relief prayed for ; but if he has been guilty of improper conduct, he will be deprived of his costs, and in some cases may even be compelled to pay costs ; (*Ditillin v. Gale*, 7 Ves. 583 ; *Morony v. O'Dea*, 1 Ball & Beatty, 121, note.) If the mortgagor in this case had applied to Brockway for the surplus raised on the sale, over and above the amount due on this mortgage, and the latter had refused to account with him for it, I should have thought this decree right in not only refusing costs to the mortgagee, but also in charging him with the costs of the litigation ; (*Slee v. The Manhattan Company*, 1 Paige's Rep. 48.) But the complainant claimed a right to redeem the land in the hands of the assignee ; and the principal part of the costs have been incurred on that account, and he has failed as to that part of the suit. The defendant Brockway does not appear to have acted fraudulently or in bad faith in selling the contract. He only mistook his legal and equitable rights, and that forms no ground for charging a mortgagee with costs on a bill to redeem.

So much of the decree as directs the appellant to pay costs to the respondent must be reversed, and the residue of the decree appealed from is affirmed ; and neither party is to have costs as against the other, either in the court of equity, or in this court. If the appellant does not pay the amount decreed within twenty days, the respondent is to be at liberty to take out execution therefor in this court.

1839.

Brockway
v.
Wells.

1829.

Mumford

v.

Murray.

***MUMFORD AND OTHERS v. MURRAY.—BLATCHFORD AND OTHERS v. MURRAY AND OTHERS.**

The wife's equity to a support for herself and children out of her estate, which has not been reduced into possession by the husband, is paramount to the rights of the assignee of the husband under the insolvent act.

Where the property of the wife is in the hands of an officer of the Court of Chancery, she may apply by petition for a reasonable allowance out of such estate.

But if she has appropriated to her own use property which belonged to the assignee, the amount thereof must be refunded to him out of her estate.

October 6th.

CAROLINE M. DUNSCOMB, one of the defendants in the last suit, and wife of one of the complainants in the first suit, who is also a defendant in the last cause, presented her petition setting forth that a share of the fund in the hands of the receiver belonged to her as one of the children of J. P. Mumford deceased. She further stated that her husband was insolvent, and that his property had been attached under the act for relief against absconding debtors, and trustees had been appointed; that she was left together with six infant children wholly unprovided for. And she prayed that the receiver might be directed to pay over her share of the estate for her separate use, for the support of herself and children. The petition was served on all the parties in the cause, and upon the trustees of her husband's estate. The trustees objected to the proceeding by petition, as they had not been made parties to the suit. They also put in an affidavit stating that a part of the husband's property had been removed and secreted after he absconded, and that they were informed it had been appropriated by the wife to her own use.

R. M. Blatchford for the petitioner.

J. Oswald Grim for the trustees.

THE CHANCELLOR:—The wife is entitled to a reasonable amount out of the property for her support. That amount must also include the necessary provision for her children.

*In *Steinmitz v. Halthen*, (1 Glyn. & Jam. 64,) it was holden that the wife's equity to a support out of her separate property, for herself and children, attached the moment a bill was filed in respect to it; so that if she died before payment, her children were entitled to a support out of it, to the exclusion of the assignees of the husband, who had been declared a bankrupt.

I see no necessity for proceeding by bill in this case. The fund is in the hands of an officer of the court. And if the wife's equity did not attach thereon the court would order the receiver to pay it over to the assignees on their petition. The right must be reciprocal, unless there are sufficient grounds laid to authorize the court to direct a more formal proceeding by bill. The rights of both parties in this case may be equally well protected by a reference.

If the wife asks equity here she must do equity; and if she has in her possession, or has appropriated to her use, or the support of herself or her children, any property which belonged to her husband at the time the attachment was taken out against him, she must surrender such property or refund the value thereof to the assignees before she is entitled to the fund in court.

There must be a reference to a master to ascertain what will be a reasonable amount to be allowed the petitioner out of her share of the property, for the support of herself and children. He must also inquire and report what property, which belonged to the husband at the time the attachment issued, is now in the hands of the wife, or has been appropriated by her for the support of herself and children, or otherwise since that time; with leave to the trustees to examine her on oath before the master in relation thereto. All other questions are reserved until the coming in of the master's report.

1829.

Mumford
v.
Murray.

1839.

Dunkin
v.
Vandenbergh.

*DUNKIN v. VANDENBERGH.

A party against whom a decree for costs has been made will not be permitted to off set against such costs a decree or judgment in his favor in relation to a distinct matter, to the prejudice of the solicitor's lien.[1]

But where different claims arise in the course of the same suit, or in relation to the same matter, they may be arranged and off set agreeable to equity without reference to the lien of the solicitor.

The solicitor's lien is only on the clear balance due to his client after all the equities arising out of that particular litigation are settled.[2]

The Court of Chancery will not on motion allow a debt which is not ascertained by judgment or decree to be off set against a decree for costs, to the prejudice of the solicitor's lien: although the validity of the debt is admitted by the client.

The power of the Court of Chancery to off set one judgment or decree against another, on motion, is the same as that of the common law courts. But on a bill filed for an off set, the jurisdiction of the Court of Chancery is more extensive than that of the common law courts.

October 6th.

THE complainant filed a bill in this cause to set aside an assignment made by the defendant, who was insolvent, as fraudulent. After the defendant had put in answer, the bill was dismissed, with costs for want of prosecution. The complainant then applied to set off a note which he held against the defendant, and which by his answer he had admitted to be due, against the costs taxed in this suit. The application was resisted by the solicitor for the defendant, upon the grounds that the whole costs belonged to him; that the defendant was unable to pay him any thing, and that he had himself been obliged to pay the costs of an insufficient answer to the adverse party, to enable his client to make a proper defence to this suit.

J. S. Van Rensselaer for the complainant:—The attorney's or solicitor's lien for costs is subject to all the equities

[1] See *Gridley v. Garrison*, 4 Paige, 647; but see *Nicholl v. Nicholl*, 16 Wen. 446.

[2] *Pope v. Armstrong*, 3 Sneed & Marshall, 214.

existing between the parties as to set-off. The bill in this cause was dismissed upon the motion of the complainant, with costs. A set-off is allowed against the costs of the opposite attorney in all cases except where the damages are unliquidated. The solicitor's lien for costs only extends to the clear balance resulting from the equity between the parties. *In England the rule as to set-off against an attorney's costs in the King's Bench is different from that in the Common Pleas. The Court of Chancery there has adopted the Common Pleas' rule. (*Vaughan v. Davies*, 2 H. Black. 440.) In *Gurish v. Donovan*, (2 Atk. 186,) costs of the solicitor of one of the parties was set off against a judgment for damages and costs recovered at law against his clients. In *Taylor v. Popham*, (15 Ves. 79,) Lord Eldon held, that where different demands arise in the same cause, the costs shall be adjusted as the equities between the parties require, without considering the solicitor's lien. (*Ex parte Rhodes*, 15 Ves. 541. The Supreme Court have adopted the rule of the English Common Pleas. *Potter v. Lane*, 8 John. R. 357.) In Chancery a set-off is matter of right. (*Simpson v. Hart*, 14 John. 68.) In the case of *The Mohawk Bank v. Burrows*, (6 John. Ch. R. 317,) Ch. Kent said, that if the debt of the defendant to the complainant had been admitted, it would have been set off against the costs of the defendant's solicitor. In this case the debt of the defendant is admitted by him in his answer.

1839.
Dunkin
v.
Vandenberg.

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C. Y. Lansing, contra, cited 2 Cowen's Rep. 174; *Mohawk Bank v. Burrows*, (6 John. Ch. R. 317.) He contended he had brought himself within the principle laid down in 6 John. Ch. R. 317; that the attorney's or solicitor's lien for costs recovered, will not be suspended, or satisfaction delayed, until an unliquidated claim of the opposite party can be ascertained and a balance finally struck between the parties. The debt of the defendant in this case had not been ascertained and settled by a judgment. It remained unliquidated. And to allow it to be set off against the

1839. costs of the defendant's solicitor, would be going beyond all
 Dunkin the cases cited on the other side.
 v.
 Vandenberg.

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THE CHANCELLOR:—On a bill filed in this court for a set-off, the powers of this court are more extensive than those of courts of common law where a set-off is claimed there in the ordinary progress of a suit. But on applications of this kind I apprehend the ground on which relief is granted is the same in all courts. It is the equitable control which they *are authorized to exercise over the parties and proceedings in causes before such courts, to prevent injustice. Hence one court will not order a party against whom a judgment has been obtained, to deduct the amount from a judgment which he has obtained against the adverse party in another court, but will leave such adverse party to apply to the court where the judgment against himself had been obtained, and which court alone has power to control the proceedings on that judgment. (*Brewerton v. Harris and Harris*, 1 John. Rep. 144; *Lessee of Underwood v. Courtown*, Irish Term. Rep. 427.) I am not aware of any case in which a set-off has been allowed on motion, either in this court or in a court of law, except where the demand claimed to be set off against the judgment or decree of the adverse party was judicially determined or settled by the order, judgment or decree of some court of competent jurisdiction. The demand which the complainant claims to off set against this decree for costs, is nothing but a promissory note on which no judgment or decree has passed. Although the answer admits the defendant's indebtedness, which might have been conclusive against him in this suit, this cause is now at an end. In the suit now pending in the Supreme Court on the note, the defendant will still be at liberty to plead the illegality of the consideration set up in his affidavit on this motion. Independent of the solicitor's lien, I think the note is not a proper subject of set off against this decree for costs.

But as the other question is now before me, I will dispose

of that also. It has repeatedly been decided in the Supreme Court that the attorney's lien will prevent one judgment from being set off against another in such a manner as to deprive him of his costs. (*Cole v. Grant*, 2 Caines' Rep. 105; *Devoy v. Boyer*, 3 John. Rep. 247.) In this respect that court has followed the rule of the King's Bench in England, which differs from that of the Common Pleas. But I should regret to see the same difference existing between the practice of the Court of Chancery and the Supreme Court here. The rule should be the same in all courts, as there is no difference in principle. It is supposed by the counsel for the complainant from an expression of the Supreme Court in **Porter v. Lane*, (8 John. R. 357,) that the judges intended to adopt the practice of the Common Pleas in England in opposition to that of the King's Bench. But on examination it will be found that case did not depend on the question upon which the two courts in England differ. That question is whether the costs in different and independent suits can be off set against each other to the exclusion of the attorney's lien. As to that the practice of the English Common Pleas differs from that of all other courts, and is in direct opposition to the decisions of the Supreme Court in *Cole v. Grant*, and *Devoy v. Boyer*, before referred to. But the question which arose in *Protter v. Lane*, was whether the lien of the attorney could interfere with the equitable rights of the parties in the same suit or matter. In this respect the practice adopted by the Supreme Court is in conformity to that of the King's Bench in England, as well as to that of the Common Pleas. (*Howell v. Harding*, 8 East's Rep. 362.) The same rule also prevails both in the English and Irish Courts of Chancery. In *Shine v. Gough*, (2 Ball & Beatty, 83,) Lord Maaners adopts the rule laid down in the case of *Taylor v. Popham*, (15 Ves. 79.) In that case Lord Eldon says, "where different demands arise in a cause, the costs should be arranged as the equities between the parties require, with-

1829.

Dunkin
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 v.
 Vandenberg.

out considering the solicitor." And in the case of Bryant, (1 Mad. Rep. 49; 2 Rose's Cas. 287, S. C.,) the party in whose favor the costs of a petition was granted, was not permitted to release them to the prejudice of the solicitor's lien, though the consideration of such release was the discharge of a debt due to the adverse party, before such costs accrued. And surely if the party could not voluntarily release them upon such a consideration, he ought not to be permitted to do the same thing indirectly by confessing a judgment for that debt and having the same off set.

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The question in all these cases is, what is equitable and just between the parties and the attorney or solicitor? Where different claims arise in the course of the same suit, or in relation to the same matter, it is undoubtedly equitable and just that these equities should be arranged between the parties *without reference to the solicitor's or attorney's lien. His lien is only on the clear balance due to his client after all these equities are settled. But when other claims, arising out of different transactions and which could not have been a legal or equitable set-off in that suit, exist between the parties, the court ought not to divest the lien of the attorney or solicitor which has already attached on the amount recovered for the costs of that particular litigation. When a party applies to the equity of the court to prevent the solicitor from exercising his legal right to collect his costs, the equity of the solicitor to have those costs should be taken into consideration. When the solicitor has been at the labor and expense of prosecuting or defending a suit, it is equitable and just that his costs should be paid out of the result of that litigation. If the equities of the parties are equal they should be left to the exercise of their legal rights. If the solicitor can collect his costs by execution the court will not permit his client to interfere and deprive him of his remedy. But if he is obliged to resort to a suit in the name of his client, the adverse party may avail himself of any proper subject of off-set which existed previous

to the time of the solicitor's lien. But a demand acquired after that time cannot be off set either at law, or by an application to the equitable powers of a court on motion.

1829.
Dunkin
v.
Vandenberg.

In the case of *The Mohawk Bank v. Burrows*, (6 John. Ch. Rep. 817,) although the decision was against the application for a set-off, yet the reasoning of Chancellor Kent is undoubtedly in opposition to the opinion above expressed. He supposes the doctrine of the Supreme Court to be in accordance with the practice of the English Common Pleas; and he founds that opinion upon the loose expression in *Porter v. Lane*, which I have already shown applies to a different question. He has evidently overlooked the two cases of *Cole v. Grant* and *Devoy v. Boyer*, which were decided while he presided in that court, in both of which the decisions are in opposition to the practice of the Common Pleas, and in exact conformity to the rule of the Court of King's Bench. The case of *Taylor v. Popham*, cited by Chancellor Kent, was not a question of set-off, but a question between the solicitor of a *simple contract creditor and a bond creditor, whether his cost in a suit against the estate should be paid in preference to the debts due by specialty from the client, for which the estate was also liable. The solicitor petitioned to have his costs paid out of the funds recovered, and it was granted; but on a rehearing Lord Eldon decided that the bond creditor had a prior equity to be paid out of the assets and disallowed the claim of the solicitor. The costs in the suit by the simple contract creditor against the estate were not decreed against any one; but if the fund had eventually belonged to him, the solicitor would have been permitted to retain the costs out of the amount recovered. In the subsequent suits, against his client and the estate of his father, it appeared the fund did not belong to the client but to the executors of Lord Holland who were the specialty creditors. The whole fund was therefore disposed of as a subject of relief in the last suit. The reasoning of Lord Eldon must be understood in reference to such a state of facts, and is not in-

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1829. consistent with the opinion expressed by him in *Hall v.*
 Dunkin *Ody*, when he was chief justice of the Common Pleas.
 v. Mr. Justice Buller must have been misinformed as to the
 Vandenberg. decision mentioned by him in *Vaughan v. Davies*, in 1795.
 There is no such case reported, and the practice of that
 court was understood to be different by the Lord Chancellor
 as late as 1806. In the first report of the case of *Taylor v. Popham*, (13 Ves. 61,) Lord Erskine says, "The lien
 of an attorney for his costs, as between him and his client,
 cannot be disputed. If an attorney employed to sue, recovers
 500*l.*, and is entitled to tax the costs, and the client being a
 debtor to the defendant in that action to a greater amount
 than the sum recovered, did not plead a set-off, but afterwards
 brings an action and recovers a greater sum, that would not
 deprive the defendant in that action of his right to costs in
 the other. The attorney undertakes the suit upon the personal
 credit of the client, which has a good effect in preventing
 vexatious suits; as the attorney, unless he sees a probability
 of success, will not encourage the client. But by the result
 that the client is entitled to costs, it is admitted they are
 the costs not of the client but of the attorney; the effect of
 his lien, *of which he is not to be deprived, unless satisfied
 by other means." This principle was not intended to be
 shaken in the subsequent decision of Lord Eldon. Lord
 Erskine carried the principle still further, and gave the
 solicitor a lien upon the fund to the exclusion of a prior
 lien which existed in favor of the specialty creditor. It
 was this part of the opinion of Lord Erskine which was
 subsequently found to be wrong. In the subsequent case,
Ex parte Rhodes, (15 Ves. 539,) it is evident Lord Eldon
 did not intend to carry the principle any further than it
 is carried in *Porter v. Lane*, and in *Taylor v. Popham*;
 for he refers to the form of proceedings in Chancery
 which is always to regulate the various claims between
 the parties, both as to damages and costs, so as to make
 a decree only for the net balance which is the result of
 equity between the parties in relation to

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that suit or matter. But when a final decree has been made giving costs against a party on which the solicitor's lien has attached, there is no form of proceedings, neither have I been able to find any case, either in this court or in the English or Irish courts of Chancery, where the party against whom the decree was made, has been permitted to off set a judgment for debt or costs in relation to a distinct matter, either in the same or any other court, to the prejudice of the solicitor's lien. In a recent suit in the English Court of Chancery, the Vice-Chancellor refused to direct the costs of a suit in that court for which the complainant was liable, to be off set against the costs for which there was a judgment in his favor in the Court of King's Bench. He refers to the opinion of Lord Eldon, in *Taylor v. Popham*, but says "that case is not an authority for setting off against each other the costs of different causes in this court; and still less for setting off costs here against costs in the King's Bench, when it is clear that court would not permit the set off of costs there against the costs here." (*Wright v. Mudie*, 1 Sim. and Stuart, 266.)

1829.

Dunham
v.
Jackson.

The application for a set-off in this case must be denied with costs.

*DUNHAM v. JACKSON.

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If the party against whom a final decree is made intends to remove beyond the jurisdiction of the court before the decree can be enforced by execution, a *ne exeat* will be granted.

A *ne exeat* is in the nature of equitable bail, and may be applied for in any stage of the suit.

IN this cause the bill of the complainant had been dismissed with costs; and the complainant had suspended the proceedings to collect the costs by an appeal to the Court of Error. October 7th.

1829.

Case
v.
Abel.

L. H. Palmer, upon an affidavit and petition stating that the costs were large, and that the complainant intended removing to Florida before the appeal could be determined, moved that a *ne exeat* issue, unless the complainant gave security to abide the decree of this court and of the Court of Errors.

H. Bleecker, contra, read an affidavit of the complainant, which stated that she was worth \$25,000 over and above all debts, and that she did not intend to remove to Florida until February next.

THE CHANCELLOR:—The object of the writ of *ne exeat* is to obtain equitable bail, and may be applied for in any stage of the suit. The complainant intends to leave the state before the appeal can be determined. The defendant is not obliged to follow her to Florida to obtain satisfaction of the costs decreed. In *Stewart v. Stewart*, (1 Ball & Beatty, 73,) a *ne exeat* was granted against a complainant who was about to leave the country before the decree for costs could be made effectual against him.

The *ne exeat* must be granted in this case unless the complainant gives security to abide the final decree.

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*CASE AND WIFE v. ABEL AND OTHERS.

The master's certificate as to the insufficiency of an examination of a party on interrogatories, does not require an order of confirmation.

If the master's certificate is not excepted to within eight days after notice of the filing thereof it becomes absolute of course.

The practice in relation to exceptions to answers for insufficiency must be adopted and pursued, as far as the same is applicable to exceptions to the examination of a party.

If the examination is reported insufficient, the master may allow new interrogatories to be added by the adverse party, and the exceptions and new interrogatories must be answered together.

If the examination is certified by the master to be sufficient, the adverse party cannot re-examine the defendant to the same point without the permission of the court.

1839.

Case
v.
Abeel

ON taking the account as directed by the decree in this November 4th. cause, (*ante*, 393,) G. B. Abeel, one of the defendants, was examined on interrogatories before the master. The examination was excepted to for insufficiency, and upon the reference two out of five of the exceptions were allowed. The complainants thereupon applied for a confirmation of the report, and for other directions as to the practice to be pursued to compel a further examination. They also asked leave to add new interrogatories, and that the defendant might be required to put in his further examination to the exceptions and additional interrogatories together.

J. Rhoades for the complainants.

H. Bleecker for the defendants.

THE CHANCELLOR:—The certificate of the master as to the insufficiency of the examination does not require an order of confirmation. In this respect it is like the report of the master as to the sufficiency of an answer. The practice in relation to exceptions to an answer for insufficiency must be adopted and pursued in these cases, so far as the same is applicable. On filing the master's certificate, and notice thereof, if the defendant does not except to the same within eight days, the certificate will become absolute. And on filing *an affidavit of that fact the complainant may enter an order of course that the defendant put in his further examination, and pay the costs of the exceptions and the proceedings thereon within such time as the master may prescribe, or that an attachment issue against him. On filing the certificate of the master showing his default, the complainant may have an order of course for an attachment. If the major part of the exceptions are not allowed, the complainant will not be entitled

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 Adams
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 Beekman.

to costs. In case the master certifies that the examination is insufficient, the complainant may add new interrogatories to be approved of by the master if he shall deem such further interrogatories necessary; and the order will then be that he put in his further examination to the exceptions and the new interrogatories together within such time as the master may direct. But if the examination is certified by the master to be sufficient, the complainant will not be permitted to call for a re-examination of the defendant to the same point, on new interrogatories, without special permission of the court on cause shown, and upon notice of the application to the adverse party.

In this case the complainants are to be at liberty to exhibit new interrogatories to be approved of by the master, and the defendant G. B. Abeel must put in his examination to the exceptions and further interrogatories within such time as the master may prescribe, or an attachment must issue to compel the same. A majority of the exceptions not having been allowed, the complainants are not entitled to the costs of the reference.

ADAMS v. BEEKMAN AND OTHERS.

Where A. by his will devised the use of his farm to his son and nephew for three years, and directed his executors at the expiration of the term to sell the farm and divide the proceeds among his five children; and also declared in his will, that if any one of his children died before him, leaving no children, or should die after his decease, leaving no children, without having disposed of his or her share, that the share of such child should go to the survivors; but if any of the testator's children should die leaving children, then such children were to have the share of their parent in the *same manner as such parent if living would have taken the same; and the son died within the three years leaving children; it was held that the children took under the will and not as heirs of their father, and that their mother was not entitled to dower in the farm, and that the creditors of the son had no claim upon that share of the estate for the payment of their debts.

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The death of the son before the expiration of the three years and before the executors were authorized to sell, divested his interest, and the executory limitation over to his children immediately took effect.

1829

Adams
v.

Beekman

Where there is a bequest in remainder after the determination of a particular estate, with an executory limitation over in case of the death of the legatee, the legatee takes only a contingent interest, which will be divested if he dies during the continuance of the particular estate, and the limitation over will take effect.

WILLIAM ADAMS by his will devised the use of his farm November 4th. to his son, the husband of the complainant, and to his nephew for the term of three years. He directed his executors, at the expiration of that time and as soon thereafter as could conveniently be done, to sell the farm and divide the avails among his five children. By a subsequent clause in the will it was provided that if any of his children died before the testator, leaving no children, the share of the child so dying should go to the survivors; and also in case any of them should die after his (the testator's) decease leaving no children, and not having disposed of his or her share of the estate, the same should likewise go to the survivors; but in case any of the testator's children died leaving children, then such children were to have and take the share of their parent in the same manner as such parent, if living, would have taken the same. The son died within the three years, leaving the complainant, his widow, and the infant defendants, his children. The widow and nephew continued to occupy the farm together until the expiration of the three years, since which time a part thereof has been sold by the executors according to the directions of the will. The complainant administered on the estate of her deceased husband and commenced this suit against the executors of her father in law and her infant children, claiming dower in one-fifth of the proceeds of the sale, and that a part of that fifth should be applied to the payment of the debts due from her deceased husband. The executors suffered the bill to be taken as confessed *against them, and the children put in a general answer by their guardian.

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1829.

Adams
v.
Beckman.

THE CHANCELLOR:—The guardian *ad litem* has not brought the rights of these infant defendants properly before the court, but there is sufficient on the papers to enable me to see that the complainant's claim cannot be sustained. The one-fifth of the proceeds of the sale of the farm is not given by the will absolutely to the son. Although the testator directs the farm to be sold at the expiration of the three years and gives the proceeds to his five children forever, it is evident from the subsequent clause that he contemplated the event which has actually happened, to wit, the death of some of his children before the expiration of the three years, or before the proceeds of the sale were reduced into possession, or disposed of by them. By the fifth clause of the will the testator provided for such a contingency and has directed that the share of the legatee so dying should go to his children if he has any, and if not it is to go to the surviving children of the testator.

From the case of *Hutchin v. Mannington*, (1 Ves. jun. 366,) it would seem that the expressions in the fifth clause of this will were not sufficient to carry the limitation over to the children of the son if he had lived until the expiration of the term of three years. But that decision was seriously questioned by Lord Eldon in *Stilwell v. Bernard*, (6 Ves. 536,) and in *Gaskell v. Harman*, (11 Ves. 497,) although it is not expressly overruled. That question is not material in the determination of this case. Where there is a bequest in remainder after the determination of a particular estate, with an executory limitation over in case of the death of the legatee, such dying is to be applied to the time when the remainder takes effect in possession, and not to the time of the death of the testator.[1] The legatee takes but a contingent interest which will be vested if he dies during the continuance of the particular estate, and the limitation over will take effect. (*Harvey v. McLaughlin*, 1 Price's Rep. 264; *Galland v. Leonard*, 1 Swanst. 161.)

[1] See *Home v. Pillans*, 2 My. & K. 15.

In this case by the death of the son during the term, and before the executors were authorized *to sell the farm and divide the proceeds, his interest was divested, and the executory limitation over to his children took effect. They are entitled to the share of the proceeds which would have belonged to him if living. They do not take as heirs of their father but as contingent legatees under the will.[1] Their mother is not entitled to any part thereof, either as dower, or under the statute of distributions; neither can it be subjected to the claims of the creditors of the estate of their father.

1870.

Dunham
v.
Osborn.

I regret to be compelled to say the interest of these infant defendants has been wholly neglected by those whose duty it was to protect their rights. The executors instead of submitting the construction of this will to the court, have suffered the bill, which did not contain that part of the will on which the rights of the infants depended, to be taken as confessed; and the guardian appointed by the court to conduct the defence of the infants, instead of attending to it has entrusted it to a solicitor whose name appears to the complainant's bill as her counsel, and who does not even appear at the hearing to submit the facts in the case to the consideration of the court. If another such case occurs I shall consider it my duty to inquire who is the guardian *ad litem*. The complainant's bill must be dismissed, but as the guardian has wholly neglected his duty he has no claim for costs, even as against her.

[1] See *Dunham v. Osborn*, *post*, note.

DUNHAM v. OSBORN AND OTHERS.

To entitle the wife to dower, the husband must have been seized during the coverture of a present freehold as well as of an estate of inheritance in the premises.

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Seizin of a vested remainder is not sufficient where the husband dies, or aliens his interest in the premises, during the continuance of the particular estate.[1]

Where lands descend to the son, on the death of the father, and dower is assigned to the mother, if the son dies during the life of the mother, his widow can only be endowed of the remaining two-thirds.

But if the lands are conveyed to the son by the father, the widow of the son will be entitled to dower in the other third also after the death of the mother.

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*Where the estate has been sold on an execution against the husband, who afterwards died leaving a widow entitled to dower, the widow of the purchaser will be entitled to dower in the whole premises, subject to the dower right of the first widow in one-third thereof.

November 8th.

A BILL for partition was filed in this cause, and the only question between the parties was as to the extent of the dower right of the widow of D. Dunham in the premises. J. H. Maxwell was the former owner of the premises, and his right thereto was sold upon execution in his lifetime, and two-thirds thereof became vested in D. Dunham, and the other third in Osborn. D. Dunham died in the lifetime of Maxwell. Upon Maxwell's death, his widow became entitled to dower in the premises; but it was insisted that the widow of Dunham was not entitled to dower therein, as there could not be two rights of dower in the same premises by the seizin of two successive owners.

H. W. Warner for complainant.

Jno. L. Graham for defendant Osborn.

Jas. L. Graham for Withers and wife.

J. O. Grim for the other defendants.

THE CHANCELLOR:—Maxwell having been the sole

[1] See 4 Kent, 39, 40; Ferne on Remainders, (5th ed.) 35, 36; Park on Dower, 61, 73; *Green v. Putnam*, 1 Barb. S. C. 500; *Beardsley v. Beardsley*, 5 id. 324; *Reynolds v. Reynolds*, 5 Paige, 161; *Matter of Creiger*, 1 Barb. Ch. 598.

owner during coverture, there can be no doubt of the right of his widow to dower in the whole premises, in value as they were at the time of the sale on the execution against her husband. (*Hale v. James*, 6 John. Ch. Rep. 258.) But it is insisted there cannot be two rights of dower in the same premises, and that the widow of D. Dunham must be wholly excluded. Two widows cannot be endowed of the whole estate at the same time; and if the widow of the person last seized is endowed, it must be of the remainder of the estate only, subject to the dower of the widow of the person first seized. To entitle the wife to dower, the husband must be seized either in fact or in law of a present freehold in the premises as well as of an estate of inheritance. His seizin of a vested remainder is not sufficient, if he dies or aliens his interest in the premises during the continuance of the particular estate. (*Eldridge v. Forrestal & Wife*, 7 Mass. R. 253; *Shoemaker v. Walker*, 2 Serg. & Rawl. 554.) Hence if the father die, and the land descends to his son and heir, subject to the dower of the mother, and dower is assigned to her in the premises, and the son dies during the continuance of her estate, the widow of the son will be entitled to dower in the remaining two-thirds; but will not be entitled to dower in the reversion of that part which was assigned to the mother as tenant in dower. As to that part, the moment the mother is endowed, her seizin relates back to the death of the husband, and is considered a continuance of his seizin, so that there never was any seizin in the son. But the case is different where the father conveys to his son. By the conveyance, the son becomes seized of the whole premises, subject to the dower right of his mother if she survives the grantor; and the wife of the grantee is entitled to dower in the whole subject to the same right. The maxim *dos de dote peti non debet* does not apply to such a case. (Perk., sec. 315; Coke's Litt. 31 a, b; *Pari's case*, 4 Coke's Rep. 122; Watkins, ch. 1, sect. 3, p. 74.) In this case, the sale of Maxwell's estate, under the judgment and execution against him, gave a present seizin of an estate, of

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inheritance to the purchasers, subject to the life estate of Mrs. Maxwell if she survived her husband; and the widow of D. Dunham is entitled to dower in his share of the premises. The widow of Maxwell is entitled to have assigned for her dower one-third of the premises, and Mrs. Dunham will be entitled to dower in two-thirds of the reversion of that third if she survives Mrs. Maxwell. She is also entitled to dower in two-thirds of the other two-thirds of the premises from the present time. If the property is sold under the decree in this cause, the interest of each in the purchase-money must be estimated upon the same principles; and if the value of Mrs. Dunham's life is worth the same, or less than that of Mrs. Maxwell, the dower right of Mrs. Dunham in the first third is worth nothing.

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*EDMESTON AND RIDDLE, EXECUTORS, &c. v. LYDE AND WALTON.

A creditor whose execution at law has been returned unsatisfied, may file a bill to reach the equitable estate of the defendants, either in his own name and for his own benefit; or he may join with other creditors standing in the same situation with himself; or he may file a bill in behalf of himself and all others, being judgment creditors, whose executions have been returned unsatisfied and who may choose to come in under the decree and contribute to the expenses of the suit.

A judgment creditor does not obtain a specific lien upon the equitable estate of the debtor by the return of an execution unsatisfied, but by the commencement of a suit in equity after the execution has been so returned.

An assignment by the defendant of his property after the filing the bill in this court, will not divest the lien of the judgment creditor.

Where property has been fraudulently assigned by the debtor, so that he has no legal or equitable rights as against the assignee, it will be necessary to make the assignee a party to enable the court to reach the property in his hands.

But where the debtor still retains the legal or equitable interest in the property, such interest may be conveyed to the complainant or transferred to a receiver under the decree of the court, without making the trustee of the defendant a party.

The debts, choses in action and other equitable rights of the defendant may be assigned or sold under the decree of this court, and the purchaser will be protected both in equity and at law.

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Every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts.

THE complainants recovered judgment against the de- Nov. 16th.
fendants in the Supreme Court for \$3,945 59, and issued a
fiery facias thereon to the sheriff of the city and county of
New York, where the defendants were arrested and where
they still resided. The sheriff having returned the execu-
tion unsatisfied, the complainants filed their bill in this
cause for a discovery, and to obtain satisfaction of their
judgment out of the equitable estate and choses in action
of the defendants, which could not be reached by the exe-
cution at law. By the answer, the facts stated in the bill
were admitted. The defendants also admitted that they
were insolvent and unable to pay their debts; that certain
real estate of theirs was sold under an execution in their
favor and bid in by W. G. *Buckner for their benefit, sub-
ject to the lien of such sums as he should advance to them
from time to time, for which they held his written receipt,
or acknowledgment of the trust; and that he had advanced
to them \$1,400 on account thereof. The defendants also
set out in their answer an account of several choses in action
of small or doubtful value, which belonged to them at the
time the complainants' bill was filed. They also alleged
that there were other judgment creditors whose judgments
were prior to that of the complainants, and that such credi-
tors ought to be made parties to the suit. The cause was
heard on bill and answer; and the questions raised on the
hearing were, whether the other judgment creditors and
Buckner ought to have been made parties; and as to the
nature of the relief to which the complainants were entitled.

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R. Sedgwick for the complainants.

G. Griffin for the defendants.

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THE CHANCELLOR:—The first question in this case is as to the rights of the other judgment creditors of the defendants, and whether they are necessary parties. It might be sufficient in this case to say they do not stand in the same right with the complainants, as it does not appear by the answer that executions in those causes have been actually returned unsatisfied; which was necessary to give them any right to come into this court for relief; (*Beck v. Burdett*, 1 Paige's R. 305.) But it may be useful to inquire whether they would be necessary parties, even if that fact was distinctly alleged in the answer. I have once had occasion to examine this question elsewhere, and the conclusion to which I arrived was, that the creditor whose execution at law was returned unsatisfied might file a bill to reach the equitable estate of the defendants, either in his own name and for his own benefit, or might join with others standing in the same situation in a joint suit for their joint benefit, in proportion to the amount due to each, as in the case of *McDermott and others v. Strong*, (4 John. Ch. R. 687,) or that he might file a bill, in the usual way, in behalf of himself and all others standing in the same situation, as judgment creditors whose executions *had been returned unsatisfied, and who might choose to come in under the decree and contribute to the expenses of the suit. I can see no reasonable objection to either mode of proceeding. The latter at the first blush may appear the most equitable, but the two first are much more likely to insure a vigilant prosecution of the suit. And on further examination it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit.

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The case of *McDermott and others v. Strong*, does not sanction the idea that a party obtains any specific lien upon

the equitable estate of the debtor by the return of an execution unsatisfied. But by that act he puts himself in a situation to obtain a specific lien by the commencement of a suit here. In that case the complainant's executions had been returned unsatisfied, and their suit in this court had been pending several months before the debtor conveyed his property to the defendants, as his assignees under the insolvent act; and the complainants had also given notice to the original trustee that they intended to seek satisfaction out of the trust fund, by the aid of this court. Under these circumstances the Chancellor, very properly, decided that by their legal diligence the complainants had obtained a specific lien upon the fund which entitled them to a preference. But it is evident he did not consider the issuing of the executions as giving any priority; for the execution of one of the complainants was issued in May and the other in June, yet the decree in that case provided that if the fund was not sufficient to satisfy both judgments, it should be distributed among the complainants rateably, in proportion to the amount due to each. Where the property is not levied on by the execution, or where, from its nature, it could not be reached by an execution at law, the return of the execution unsatisfied does not give to the creditor any specific lien. He must follow up his execution by the commencement of a suit here, before he *can obtain any claim to a priority. The creditor whose legal diligence has pursued the property into this court is entitled to a preference as the reward of his vigilance. In *Edgell v. Haywood*, (3 Atk. Rep. 357,) Lord Hardwicke says, "The court does not proceed in this case on the ground of a specific lien, but only considers it a part of the property of the debtor which the creditor cannot come at without the aid of this court. If, therefore, after judgment, or even after the *feri facias* had been issued, the debtor had assigned this *bona fide*, and for a valuable consideration, and without notice, it would be good, and prevail against this creditor. But after a bill brought and a *lis pendens* created

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as to this thing, such assignment could not prevail." So in the case of *Spader v. Davis*, (5 John. Ch. Rep. 280,) the holder of a fund under an assignment which was fraudulent in law, was held accountable only for so much thereof as remained in his hands at the time of the commencement of the suit in this court. If the creditor whose execution is first returned unsatisfied pursues the race of legal diligence, by the commencement of a suit here, he will obtain the reward of his vigilance; but if he abandons the pursuit, or lingers on the way, before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance. The other judgment creditors were not necessary parties and the complainants are entitled to a preference in payment out of the equitable assets which belonged to the defendants at the time of the commencement of this suit.

Neither was Buckner a necessary party. Where the property has been fraudulently assigned by the debtor, so that he has no legal or equitable rights as against the assignee, it will be necessary to make the assignee a party, to enable the court to reach the property in his hands. A decree against the fraudulent assignor would not in that case give any right to the property in the hands of the assignee. But where the debtor still retains the legal or equitable interest in the property, such interest may be conveyed to the complainant, or transferred to a receiver under the decree or order of this court; who can call upon the debtor or trustee of the defendant in the same manner as the defendant himself might have done previous to the filing of the bill. As *there is no allegation of fraud as to Buckner, if he was made a defendant he would be entitled to the advances which he has made, together with his costs. If all the right of the defendants is sold under a decree in this suit, the purchaser will be entitled to an assignment of the land from Buckner, on paying the amount due. And if he should unreasonably refuse to permit the purchaser to redeem, he might subject himself to the costs of a suit

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instituted for that purpose. The debts, choses in action and other equitable rights of the defendants may be assigned or sold, under the decree of this court, so as to vest an equitable interest in the purchaser, which will be protected both here and at law. The Court of Exchequer in England has gone so far as to compel the purchaser of a debt due to a bankrupt's estate to perform his contract specifically. (*Wright v. Bell*, Daniels' R. 95.) The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of this court are perfectly adequate to carry that principle into full effect.[1] The only difficulty is in deciding which of the various powers of the court is best adapted to the end; which will be the most convenient, and least expensive to the parties. This must in a great measure depend upon the nature of the property to be reached. I shall not therefore for the present, undertake to lay down any general rules on the subject, except one which is perfectly obvious. If the property is of such a nature that its fair value may be obtained by a sale at auction, in the usual manner, that course should be resorted to as the most expeditious and least expensive.

The principal property in this case is an equitable right

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[1] 2 R. S. (4th ed.) 353, sec. 42, and revisor's note. To entitle the judgment creditor to the aid of Chancery to obtain satisfaction of his judgment against the defendant, *out of property not liable to execution*, he must show not only an execution issued but returned *nulla bona*. *McEwen v. Willis*, 9 Wen. 548; *Clarkson v. De Pyster*, 3 Paige, 320. Therefore the plaintiff should state in his bill the issuing of the execution, the time when returnable, and the actual return of the sheriff thereon. *Cassidy v. Meacham*, d. 211. His right to relief is recognized only after he has exhausted all his legal remedies, without obtaining satisfaction. *Child v. Brace*, 4 id. 310. The judgment must be obtained in one of the courts of this state, or Chancery will not aid the judgment creditor. *Turbell v. Griggs*, 3 Paige, 207. Nor does it lie at the suit of a county to enforce the payment of *county taxes*, where the warrant for collection has been returned unsatisfied to the county treasurer, for want of property whereon to levy. *Durant v. Supervisors of Albany Co.*, 26 Wen. 66. All persons against whom the judgment was rendered should be made parties to the bill. *Child v. Brace*, 4 Wen. 309.

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to certain real estate, subject to the payment of the advances made by Buckner thereon. If that is sufficient to satisfy the complainants' debt and costs, no further proceedings will be necessary as to the other property of the defendants.

There must for the present be a decree declaring the rights of the complainants, and providing for the sale of that property, reserving further directions.

The following decree was entered :

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*" This cause having been brought on to be heard on bill and answer, and on hearing Mr. R. Sedgwick of counsel for the complainants and Mr. G. Griffin of counsel for the defendants, and the Chancellor having duly considered the same, it is this day adjudged and declared, and this court by virtue of the power therein vested doth adjudge and declare, that the complainants are entitled to the proceeds of all the choses in action, stocks, property, estate and effects of the defendants, either in law or equity, in possession, reversion or remainder, or held in trust for them or either of them, and which belonged to them or either of them, or in which they had any interest in law or equity at the time of the commencement of this suit ; or to so much of the said proceeds as may be necessary to satisfy the amount due on their judgment against the defendants, in the pleadings in this cause mentioned, with the lawful interest thereon, and their costs in this suit to be taxed : It is therefore ordered and decreed that the defendants be enjoined from collecting, receiving, disposing of or intermeddling with any of the said choses in action, stocks, property, estate or effects, or to the proceeds thereof, except so far as is necessary to preserve the same from waste or loss, until the amount of the said judgment with the interest and costs aforesaid is fully satisfied, or until the further order of this court. And it is further ordered and decreed, that all the right and interest of the said defendants, either in law or equity, to the lots or parcels of land, with the buildings therein mentioned or referred to in the receipt of William Goelet Buckner, mentioned and set forth in the defendants'

answer in the cause, together with all their right and claim against the said Buckner, for or on account of the said lots, or of the said receipt, be sold at public vendue by or under the direction of one of the masters of this court, at the Merchants' Exchange in the city of New York, the said master giving three weeks' public notice of the time and place of such sale in one of the public newspapers in the city of New York, at least once in each week; and that previous to the said sale, the said master ascertain as near as may be the amount advanced by the said Buckner to the defendants on account of the said receipt; and that he have liberty to examine the defendants, or any witnesses on oath for that purpose, if he shall deem it necessary; that the sale be made at the risk of the purchaser, for cash, and that the complainants be at liberty to become purchasers on such sale; that the master execute a conveyance or assignment to the purchaser in such form as the master may think proper, and that the defendants, if required by the purchaser, join in the said conveyance or assignment as the master may direct; and that they be required to stipulate therein that the purchaser be at liberty to use their names, if he shall deem it necessary, in any suits or proceedings in relation to the subject matter of the said sale, he giving to them such indemnity against the costs of any such suit or proceedings as may be directed by this court previous to the commencement of any such suit or proceeding. And that the master pay to the complainants or their solicitor out of the proceeds of the said sale their costs of this suit to be taxed, and also the amount of their said judgment with lawful interest thereon, or so much as the purchase-money will pay of the same, and that the master take a receipt for the amount so paid and file the same with his report; and that he bring the surplus moneys arising from the said sale, if any there be, into court without delay, to abide the further order of the court. And it is further ordered, that if the moneys arising from the said sale are not sufficient to pay the amount due on the said judgment,

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with interest and costs as aforesaid, the said master ascertain the amount of such deficiency, and specify the same in his report; and that on the coming in and confirmation of the said report, the complainants may apply to this court for such further directions as may be necessary or proper in relation to such deficiency. And in the meantime either party is to be at liberty to apply to this court from time to time as they may be advised in relation to the said property or effects of the defendants, or the preservation or disposition thereof, or the collection of the debts."

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*MASSEY AND OTHERS v. GILLELAN AND OTHERS.

Where the complainants became insolvent pending the suit, and assigned all their interest therein to a third person, the assignee was not permitted to proceed with the suit in their names without giving security for costs.[1]

Nov. 17th.

G. C. TROUP presented the petition of the defendant Gillelan setting forth among other things that the complainants were insolvent, and that this suit was carried on for the benefit of the assignees to whom the subject matter of the controversy had been assigned; and praying that security for the costs might be given by the complainants or the assignees. He cited *Ketchum & Blake v. Clarke*, (4 Johns. Rep. 484,) and *Waring v. Baret*, (2 Cowen's Rep. 460.)

S. A. Foot, for the complainants, insisted that by the answer of Gillelan sufficient was admitted to show the complainants must succeed in the suit, and for that reason Gillelan was not entitled to demand security for costs.

[1] *Miller v. Franklin*, 20 Wen. 630; *Jordan v. Sherwood*, 10 id. 622; *Schookcraft v. Lathrop*, 5 Cow. 17. So he is liable, although an assignee of only part of a demand. *Bliss v. Otis*, 1 Denio, 666; N. Y. Code sec. 321.

THE CHANCELLOR:—The defendant is entitled to security for costs. Although the parties for whose benefit the suit is now continued may be compelled to pay the costs of the subsequent proceedings, the remedy against them as to the costs already accrued is at least doubtful. They cannot however be permitted to continue the proceeding without giving sufficient security to cover the costs already incurred by the defendant, as well as those to which he may hereafter be subjected. There is nothing in the pleadings as they now stand which can enable me to determine what will be the final decision in the cause on the question of the costs. The decision on the motion to dissolve the injunction is not conclusive, as several matters of defence were set up which are not responsive to the bill, and for that reason were not taken into consideration on the decision of that motion.

The complainants or their assignees must within thirty days after service of a copy of the order, give security for the costs, by a bond in the penalty of \$250, with two sufficient sureties to be approved of by the assistant register and filed in his office. And in default thereof the bill in this cause must be dismissed with costs.

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Campbell.

 *WHITMARSH v. CAMPBELL.

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Exceptions for scandal or impertinence, under the 53d rule, must point out the exceptionable matter with sufficient certainty to enable the adverse party and the officers of the court to ascertain what particular parts of the pleading or proceeding are to be stricken out if the exceptions are allowed. If several parts of the answer, or other proceeding, are deemed impertinent, each part should form the subject of a separate exception.

THE complainant after excepting to the answer in this December 1st case, for insufficiency in divers particulars which were specified in the usual manner, and under the rule of May, 1829,

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(the same as new rule 58,) added the following exception for impertinence: "The said separate answer of the said defendant is impertinent in setting forth at full length divers letters and other documents, and in stating arguments and recitals instead of facts." The master decided this exception was well taken, and reported that the exceptionable matter was marked by him in a copy of the answer which had been laid before him, and that he had included the same in brackets. On exceptions to the master's report,

J. Hoyt, for the defendants, insisted that this exception was not well taken, as it did not specify what particular parts of the answer were impertinent.

J. Chisbie, for the complainant.

THE CHANCELLOR:—The object of the late rule of this court in relation to exceptions for scandal or impertinence, was to require the party excepting to point out the objectionable passages with such clearness and precision that the adverse party might, from the exceptions, ascertain what was to be stricken out or altered, if the exceptions were submitted to by him or allowed by the master; and that the proper officer of the court might be enabled to comply with the provisions of the 57th rule. If there are several parts of the answer or other proceeding in the cause, which are deemed scandalous or impertinent, each should form the subject of a *separate exception; with such references to the scandalous or impertinent matter, or the pages in which it is contained, as to enable the adverse party and the officers of the court to ascertain precisely what is considered objectionable. The exception in this case is defective in all these particulars, and ought not to have been allowed.

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v.
Pinney.

JOHNSON AND OTHERS v. PINNEY AND OTHERS.

Where a party is in contempt, the court will not grant an application in his favor, which is not a matter of strict right.

If he applies to the court for a favor, it will only be granted on condition that he purges his contempt, by complying with the former order of the court.

THE order to close the proofs in this cause had been regularly entered by the complainant's solicitor.

M. T. Reynolds, for the defendant Pinney, on an affidavit of merits, stating special circumstances, applied for a commission to take the testimony of a witness whose residence could not be discovered before the proofs were closed.

J. Rhoades, for the complainants, resisted the application on the ground, among others, that the defendant was in contempt for not paying a bill of costs, on a motion previously made by him to dissolve the injunction in this suit.

THE CHANCELLOR:—It is a general rule that a party cannot apply to the court for a favor while he is in contempt. (*Vowles v. Young*, 9 Ves. 173; *Prac. Reg.* 138; *Green v. Thompson*, 1 Sim. & Stu. 121.) And the complainant is not obliged to accept an answer until the party has cleared his contempt for neglecting to appear or answer. If the party does not insist upon his costs, but accepts the answer, and proceeds thereon, he cannot afterwards object that those costs have not been paid. (*Anonymous*, 15 Ves. 174; *Smith v. Blofield*, 2 Ves. & B. 100.) In this case the proofs have been regularly closed. The defendant is in contempt for not paying the costs of a former motion which failed. An attachment was issued for the costs, but they have not been paid. The favor now asked of the court ought not to be granted until the defendant clears himself of his contempt, by the payment of those costs. I do not

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James
v.
Berry.

intend to be understood as applying this principle to an application which is a matter of strict right; as a motion to set aside proceedings for irregularity; or to dismiss a bill for want of prosecution.

The motion for leave to examine this witness must be granted, without prejudice to the complainant's right to proceed to a hearing the first opportunity. But the order for leave is only upon payment of the costs of opposing this motion; and the costs necessary to be paid to purge the defendant's contempt.

JAMES v. BERRY AND OTHERS.

Where notice of the order to produce witnesses has been served upon the agent of the solicitor for the opposite party, each party has double the usual time to produce his witnesses.

If the adverse party wishes to shorten the time, he must obtain an order upon his part and serve notice thereof upon the opposite solicitor, either personally or by leaving the same at his office

December 5th. THE complainant obtained a rule to produce witnesses in 40 days, and served notice thereof on the agent of the defendants' solicitor. Previous to the expiration of the 40 days, the complainant's solicitor, upon an affidavit stating that he had not been able to examine his witnesses, applied for an extension of the time.

THE CHANCELLOR:—The true construction of the rule of December 1st, 1825, (same as new rule 68,) is, that where notice of the order to produce witnesses has been served upon an agent, each party has double the usual time, before either can enter an order to close the proofs. If the adverse party wishes to shorten the time, he must obtain an order on his part, and serve notice thereof on the opposite

solicitor in person, or at his office. The complainant in this case has therefore sufficient time left to examine his witnesses, and no extension thereof is necessary.

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Southwick
v.
Van Bussum.

*EVERITT v. HUFFMAN AND OTHERS.

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Where only part of the money secured by a mortgage is due, and the bill is taken as confessed, the reference to ascertain whether the premises can be sold in parcels is a common order.

J. BLOORE, for the complainant, presented a petition stating that only a portion of the money secured by the mortgage in this cause was due, and that the mortgaged premises were so situated that a part thereof could not be sold without injury to the interest of all concerned.

December 5th.

THE CHANCELLOR decided that under the provisions of the Revised Statutes, (2 R. S. 192, sect. 161, 162, 163,) if the bill is taken as confessed in such a case, or the complainant is otherwise entitled to a reference of course, under the 184th rule, he may have a clause inserted in the common order of reference, of course, directing the master to ascertain and report the situation of the mortgaged premises, and whether the same can be sold in parcels without injury to the interests of the parties.

SOUTHWICK v. VAN BUSSUM AND OTHERS.

An order to examine a complainant, as to any payments received by him where the defendant is either absent, concealed or a non-resident, is a common order; but an order for leave to examine a complainant in his own favor can only be obtained upon a special application.

1829. J. RHOADES, in behalf of Mr. Adriance, solicitor for the
Southwick complainant, presented an affidavit, from which it appeared
v. that the bill had been regularly taken as confessed by all
Van Buren. the defendants, and that one of them was not a resident
Dec. 5th. within this state.

[*649] THE CHANCELLOR decided that under the provisions of the R. S., (part 3, ch. 1, tit. 2, art. 4, § 128, being 2 R. S. 187, § 128,) the complainant may have a clause inserted in the *common order of reference, of course, directing the master to examine the complainant as to any payments that may have been made to him, or to any person for his use, on account of the demand mentioned in the bill, and which ought to be credited on such demand. But the Chancellor intimated that on a reference under the section next preceding the one above referred to, (i. e., 2 R. S. 186, 7, § 127,) the complainant could not be examined by the master, except by the order of the court made on a special application.

AN INDEX TO THE PRINCIPAL MATTERS.

A AGREEMENT.

1. Where a parol agreement was made for the purchase of a lot of land for the sum of \$21 50 per acre, to be paid in seven equal annual payments, and by the agreement, the grantor was to have the lot surveyed and to give a conveyance with warranty, on the payment of \$300 by the grantee, and upon his executing to the grantor a bond and mortgage for the residue of the purchase-money; and the grantee went into possession under the agreement, and continued in possession 8 or 9 years, making payments from time to time towards the land, for which the grantor gave receipts, specifying therein that the moneys received were in payment for the land, and that he, the grantor, was to give the grantee a deed therefor; the grantee made a payment of \$333 soon after he went into possession at the expiration of 8 years from the time the agreement was made, the grantor tendered a deed to the grantee, and demanded payment or security for the balance of the purchase-money, the defendant refused to accept the deed, alleging that it contained too much land, and that the grantor had included too much interest in the balance he claimed to be due; it was held, that neither party could take advantage of the agreement's not being in writing, that it was too late for the defendant to object that the grantor had not caused a survey to be made of the lot, and delivered a deed therefor immediately after the first payment, that the defendant could only have

put an end to the contract by tendering the balance due and demanding a performance of the contract on the part of the grantor; that a tender and demand made, after a bill had been filed by the grantor for a specific performance was a nullity. *Knickerbocker v. Harris*, 209

2. An offer to purchase was made by letter, and previous to the receipt of the letter by the other party, the party making the offer died insolvent. The party receiving the letter consented to sell on the terms proposed and sent an answer to that effect, but without any knowledge on his part of the death of the purchaser. Held, that he was not bound by such acceptance of the offer, and that the title to the property was not changed. *Fritch v. Lawrence*, 434

3. To make a valid contract, it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but that fact must be communicated to each other. *id.*

4. Where an offer to sell is made to a distant correspondent by letter, and he declines the offer, he cannot afterwards assent to it so as to make it a valid purchase without a subsequent assent of the other party also. *id.*

5. If he accepts the offer conditionally, the other party is not bound unless he consents to the condition. *id.*

6. Where there is a contract for the pur-

chase of land, and the person contracting to sell declines executing the contract, upon the ground that he is unable to give a good title, and the purchaser files his bill to compel the defendant to complete the contract, or to rescind it; if the defendant is able to give a good title at the time of the decree, the complainant will be compelled to accept it. *Pierce v. Nichols*, 244

7. But the defendant will be decreed to pay to the complainant interest upon the purchase-money paid by him for the land, from the time a conveyance was demanded by the complainant. *id.*

See VENDOR AND PURCHASER.

APPEAL.

1. Appellate courts which proceed according to the course of the civil law may allow the parties to introduce new allegations or further proofs. *Scribner v. Williams and others*, 550

2. But it is not a matter of course to receive further proof upon an appeal. *id.*

3. If the appellant wishes to offer new evidence, he should, in his petition of appeal, ask leave to produce further proofs, and state his excuse for not producing such evidence in the court below. *id.*

4. Upon an appeal from the sentence of a surrogate disallowing a will, the Court of Chancery will not change the appellant, he being the executor who propounded the will before the surrogate, by substituting the legatee in order to give the legatee the benefit of the executor's testimony in favor of the will. *id.*

5. The thirty days within which an appeal from the decree or sentence of a surrogate to the Court of Chancery must be entered, is to be computed from the time the same is pronounced, and not from the service of a copy thereof. *Bay v. Van Rensselaer*, 423

6. The time for bringing appeals from the equity courts being regulated by rule, the Chancellor, on sufficient cause being shown, may dispense with the rule and enlarge the time. *Smith v. Smith*, 391

7. This court alone has the power to suspend the operation of the rule and give relief in such a case. *id.*

ARBITRATION.

See JURISDICTION IN CHANCERY 1.

ASSIGNMENT AND ASSIGNEE.

1. C. held a single bill, or sealed note, against H. for \$2,425, payable to himself in twelve months from the date with interest. C. borrowed of M. \$100, and pledged this sealed note to him to secure the repayment, and indorsed his name in blank on the note. M. being indebted to the Tradesman's Bank in the sum of \$2,600, agreed to transfer the note to the bank, as security for \$1,000, part of the debt he owed the bank, provided the bank would advance to him the remainder of the note. The bank advanced the money, and M. indorsed his name in blank on the note, and delivered it to the bank. M. afterwards became insolvent, and never paid any part of the \$1,000, or the money advanced to him by the bank. Soon after C. delivered the note to M., M. received a larger sum of money belonging to C. than the amount C. owed him. The bank were ignorant of the right of C. and gave H. notice not to pay the note to any one except themselves. C. gave notice to the bank of his title to the note, and demanded it from them. The bank refused to deliver C. the note. Held, that C., having both the prior equity and the legal right, was entitled to the note. *Covell v. Tradesman's Bank*, 131

2. Had the note been negotiable, and had it been taken by the bank in the usual course of business, the equity of the bank would have been equal to that of C.; and the legal right of the bank to collect the money due on the note in their own name would have prevailed over the prior equity of C. *id.*

3. *Aliter*, if the note, although negotiable, had been transferred to the bank merely as a security for an antecedent debt. *id.*

4. Where the equities of the parties are equal, the party who has the legal right will prevail. *id.*

5. If neither party has the legal right, the maxim *qui prior est in tempore, potior est in jure*, applies. *id.*

6. The assignee of a chose in action, who only obtains an equitable interest therein, and who must sue in the name of the original owner, is not protected against a prior equity. *id.*

7. The general assignees of a bankrupt take

his estate subject to every equitable claim existing against it on the part of third persons; and this is the case, although they had no notice of such claims at the time of the assignment. A different rule exists in the case of mortgagees and *bona fide* purchasers of the legal estate. *In the matter of Howe*, 125

8. A court of chancery will judicially notice the fact that courts of law recognize and protect the rights of assignees suing in the name of their assignor. *Southgate v. Montgomery*, 41

9. The assignee of a judgment takes it subject to all the equities which existed against it in the hands of the assignor. *Webster v. Wise*, 319

10. Where the subject of litigation was a fund in the hands of an insolvent assignee, who was a defendant in the cause and had no personal interest therein, but claimed the fund for the benefit of others, the money was ordered to be brought into court, and invested, to abide the further order of the court. *Haggerty and others v. Duane and Furniss*, 321

See BANKRUPT, 1, 2, 3. DEBTOR AND CREDITOR, 13.

ATTORNEY-GENERAL.

See CORPORATIONS, 19, 20. COSTS, 23, 24. HUSBAND AND WIFE, 1, 3. MORTGAGE, 10. TRUST AND TRUSTEE, 8, 9.

B

BANKRUPT.

1. Where a British subject, being indebted, left England, and while on his voyage to this country, and before he arrived here, he was under the laws of Great Britain declared a bankrupt, and provisional assignees were appointed; it was held, that the assignment to such assignees divested the title of the bankrupt to the personal property brought with him to this country. *Plesloro v. Abraham*, 236

2. And an injunction will lie, upon the application of such assignees, to restrain a third person from delivering the goods to the bankrupt, and also to restrain the latter from receiving or prosecuting for the same. *id.*

3. And the commencement of suits against the bankrupt by his creditors in the courts of

common law of this state will not defeat the effect of the assignment to his assignees. *id.*

See ASSIGNMENT AND ASSIGNEE, 7.

C

CITIZEN.

A citizen of one state becomes a citizen of any other state, when he makes such other state the place of his actual residence. *Rodgers v. Rodgers*, 183

CONSTITUTIONAL LAW.

See CORPORATIONS, 1, 2, 3, 4, 5, 6.

CONTEMPT.

1. Where a party is in contempt, the court will not grant an application in his favor, which is not a matter of right. *Johnson and others v. Pinney and others*, 646

2. If he applies to the court for a favor, it will only be granted on condition that he purges his contempt, by complying with the former order of the court. *id.*

CORPORATIONS.

1. The privileges and franchises granted to a private corporation, are vested rights, and cannot be divested or altered, except with the consent of the corporation, or by a forfeiture declared by the proper tribunal. *McLaren v. Pennington and others*, 102

2. A state cannot pass any law which alters or amends the charter of a private corporation, without the consent of such corporation. *id.*

3. But a law altering the remedy of one of the parties to a contract, is constitutional and valid. *id.*

4. Where, however, a state legislature reserves to itself in the very charter it grants to a private corporation, the right of altering, amending, or repealing the act of incorporation, a subsequent repeal of such act of incorporation will be valid and constitutional. *id.*

5. Such a reservation in the charter of a corporation, upon common law principles, would not be a condition repugnant to the grant, but a limitation of the grant. *id.*

6. And if such a reservation at common law would be repugnant to the grant, and therefore void, it is competent for a state legislature to alter this rule of the common law. And the reservation of such a power in a legislative grant would of itself change the law in relation to that particular grant. *id.*
7. Where a state legislature repealed an act of incorporation, containing a reservation of the right of repeal, it will not be presumed this right was improperly or unconsciously exercised. *id.*
8. Where, in the election of corporate officers, no particular mode of proceeding is prescribed by law, if the wishes of the corporators have been fairly expressed, and the election was conducted in good faith, it will not be set aside on account of any informality in the manner of conducting the same. *Philips and others v. Wickam and others*, 590
9. Whether at common law, civil and corporate officers are authorized to hold over after the expiration of the time for which they were elected, until successors are appointed. *Quære. id.*
10. Where the officers of a corporation are not authorised to hold over, if the corporators, without the presence of any officer, or any act to be done on their part, possess the power to assemble and choose officers to carry into effect the objects of the incorporation, a neglect to choose officers at the proper time will not work a dissolution of the corporation, but will merely suspend the exercise of the powers of the corporation until proper officers are chosen. *id.*
11. But if the corporators have not the power to fill vacancies without the presence of their officers, or something to be done by them preparatory thereto, and such officers do not attend, or neglect to do the act requisite to the validity of the appointment, or there are no such officers, then, as the powers of the corporation cannot be revived, it is virtually dissolved. *id.*
12. The right of voting by proxy is not a general right, and the party who claims such right must show a special authority for that purpose. *id.*
13. In a suit by or against a corporation, one of the corporators is not so far a party to the suit as to be excused from testifying against the corporation. *In the matter of Kip*, 601
14. The answer of a corporator to a bill of discovery cannot be read in evidence against the corporation. *id.*
15. The declaration of corporators, although officers of the corporation, are not evidence against the corporation. *id.*
16. Corporators who have no personal interest in the controversy are competent witnesses in favor of the corporation. *id.*
17. Corporations cannot act as trustees in relation to any matters in which they have no interest. *In the matter of Howe*, 214
18. But where property is devised or granted to a corporation, partly for its own use and partly for the use of others, the right of the corporation to take and hold the property for its own use carries with it as a necessary incident the power to execute that part of the trust which relates to others. *id.*
19. Whenever a bank becomes insolvent and unable to pay its debts, the act of April, 1825, (Sess. Laws of 1825, ch. 325, sec. 17,) makes it the duty of the attorney-general to apply to the Court of Chancery for an injunction against the officers of the corporation, to restrain them from exercising any of the corporate franchises, and for the appointment of a receiver to take charge of the property and effects of the institution, and to collect and distribute the same among its fair and honest creditors. *Attorney-General v. Bank of Columbia*, 511
20. An information, verified by the oath of the attorney-general, setting forth that the bank had stopped payment, that a large amount of its bills were notoriously in circulation, and that it was reputed to be insolvent; and accompanied by the further statement of the attorney-general, under oath, that he believed the bank was insolvent, is sufficient to authorize the court to grant an injunction and appoint a receiver, where there is no denial by the corporation of the facts stated in the information. *id.*
21. Under the act to provide for the dissolution of incorporated insurance companies in the city of New York, passed April 5, 1817, the Court of Chancery should exercise the same discretionary power in decreeing a dissolution, as the legislature would, in case the latter were applied to by the directors of the company for a repeal of the charter. *In the matter of the Niagara Insurance Company of New York*, 258
22. The court is not bound to decree a dissolution of the corporation, simply because a

majority of the directors and stockholders request it to be done. *id.*

23. But where the owners of a large proportion of the stock find it for their interest to withdraw their capital, it will be deemed presumptive evidence, that the interest of the stockholders generally will be promoted by a dissolution of the corporation. *id.*

24. Upon the answer of the officers or agents of the corporation, no decree for relief can be founded either as against them or the corporation. *Vermilyea v. The Fullon Bank and others*, 37

25. After putting in their answer, they may be sworn as witnesses on the part of the complainant, and the corporation will have the benefit of their cross-examination. *id.*

26. Where an act of incorporation is repealed, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees. *McLaren v. Pennington and others*, 102

See DEBTOR AND CREDITOR, 29, 30, 31. INJUNCTION, 17. RECEIVER 2, 3, 5. SET-OFF, 3, 4, 5, 6.

COSTS.

1. In no case can a complainant, unless he prosecutes as executor or administrator, dismiss his bill without the payment of costs, not even if it should appear he would be entitled to a decree if he proceeded in the suit. *Lewis v. Germond and another*, 300

2. Where the mortgagor paid the complainants' debt and costs before any decree in the cause, the complainants were permitted to discontinue without paying the costs of junior incumbrancers who had unnecessarily appeared and answered. *The Merchant's Insurance Co. v. Marvin and others*, 557

3. Where a bill is unnecessarily filed without the direction of the court, in a case where the relief prayed for might have been obtained by petition, the complainant will not be entitled to costs. *De La Vergne v. Evertson and others*, 181

4. So where the defendant in his answer sets up an unfounded claim, costs will in most cases be denied him. *id.*

5. Where exceptions are taken to the defendant's answer, some of which are allowed and others are disallowed, and the defendant excepts to so much of the master's report as allowed a part of the exceptions to the answer and on hearing before the court, the master's report is confirmed, the complainant is entitled to the costs of the hearing, and also of the reference and of those exceptions to the answer which are allowed by the master; and the defendant is not entitled to the costs of the exceptions disallowed by the master. *Richards v. Barlow and others*, 138

6. If any of the exceptions to the answer are well taken, the defendant must submit to answer further as to those exceptions, or he will not have costs of the exceptions which are disallowed by the master. *id.*

7. Where a judgment creditor having a claim upon the surplus moneys raised by the sale of mortgaged premises, litigates in good faith before the master, on a reference to settle the priority of liens, he will not be charged with the costs of such litigation. *Norton v. Whiting and others*, 578

8. But if he excepts to the master's report and those exceptions are disallowed, he may be charged with the costs of the hearing on the exceptions. *id.*

9. On a reference of exceptions to an answer, if part of the exceptions are allowed by the master, the complainant is entitled to costs on the exceptions allowed, and neither party is entitled to costs as to those which are disallowed. *Richards v. Barlow and others*, 323

10. If some of the exceptions are disallowed and none of them are allowed in full, the defendant is entitled to his costs on the reference. *id.*

11. On exceptions to a report, each party is entitled to the costs of the hearing as to the exceptions decided in his favor, which costs are to be off set against each other. *id.*

12. Where the costs of exceptions on each side would be nearly equal, the usual practice of the court is to give no costs to either party. *id.*

13. Where a party pending the suit is admitted to prosecute a defence in *forma pauperis*, he is not excused from the payment of the costs which accrued before he was admitted to defend in that manner. *Brown and others v. Story*, 588

14. Where, in a bill filed for a specific performance of a contract for the sale of land,

the complainant insisted upon the defendant's taking two acres more than he was bound to take, and the defendant declined paying interest, which the complainant was entitled to, neither party was allowed costs. *Knickerbocker v. Harris*, 209

15. As a general rule, a mortgagor pays costs to the defendant, on a bill to redeem, although he is successful; but if the defendant has been guilty of improper conduct, he will be deprived of costs, and in some cases will be compelled to pay costs. *Brockway v. Wells*, 617

16. If a mortgagor, who is entitled to redeem, applies before filing his bill to the mortgagee for that purpose, and the latter refuses to allow him to redeem, the mortgagee will not only be deprived of costs, but may be compelled to pay costs to the complainant. *id.*

17. Where a party files his bill to redeem, the general rule is, that he must pay costs to the mortgagee, although he should be successful. *Slee v. Manhattan Company*, 48

18. There are, however, exceptions to this rule; as where the mortgagee sets up an unconscientious defence; in such case the mortgagee is not only refused costs, but must pay costs to the other party. *id.*

19. If a widow makes application for her dower before she files her bill, and it is refused, she will be entitled to costs: but where she neglected to make such application, and in her bill alleged that an outstanding mortgage was paid off, and insisted upon her right to be endowed of the whole premises, and claimed arrears previous to the purchase of the defendant, and the decree was against her upon all these points, no costs were allowed to either party. *Russel v. Austin*, 192

20. Where leave was granted to traverse an inquisition against an habitual drunkard and the finding of the inquest was confirmed, the costs to be charged on the estate of the drunkard cannot exceed twenty-five dollars; out of which sum the expenses of the committee are first to be paid. *In the matter of Van Cott*, 489

21. If an issue is awarded for the benefit of a third person, and it is found against him, no costs will be allowed to the solicitor who prosecutes the traverse. *id.*

22. Where the relatives of an habitual drunkard prosecute a commission against him in good faith, they will not be charged with

costs, although the prosecution should be unsuccessful. *In the Matter of Arnould*, 491

23. Where the complainants became insolvent pending the suit, and assigned all their interest therein to a third person, the assignee was not permitted to proceed with the suit in their names without giving security for costs. *Massey v. Gillelan*, 644

24. Where the assignee, after notice of the fraud, attempted to enforce the judgment against the land, he was decreed to pay costs to the complainant. *Webster v. Wise*, 319

25. On taxation of costs, no allowance is to be made for copies of pleadings or proceedings, except where they are actually furnished by order of the court, or in the usual course of practice. *Richards v. Barlow and others*, 323

26. Copies of pleadings for the master are not allowed on a reference of exceptions to an answer, unless in cases of difficulty where copies are required by him, and are actually made for that purpose. *id.*

27. On exceptions to a master's report on exceptions, the solicitor is only entitled to the usual fee for attendance on special motions. *id.*

28. Only one solicitor's and counsel fee can be charged on a reference; and only one fee can be allowed to the master, except by the special order of the court. *id.*

29. On references of exceptions to answer, no objections are taken to the draft of the master's report and copies of such draft for the parties are not taxable. *id.*

30. Where a defendant in a bill of foreclosure knowingly sets up an unjust defence, and thereby subjects the complainant to extra costs and expense, he may be charged personally with the costs. *Park v. Peck*, 477

31. Where the devisee of the real estate, charged with the payment of the legacy, refuses to pay the same, the costs of the legatee's suit to recover the legacy, will be a charge upon the real estate. *Birdsall adm'r v. Hewlett and others*, 33

See EXECUTORS, 7, 8, 9, 10, 11, 12, 13, 14. HUSBAND AND WIFE, 6, 28. INFANT, 1, 3. MORTGAGE, 24. PROTIOR, 44, 56, 66. SROFF, 7, 8, 9, 10.

D

DEBTOR AND CREDITOR.

1. Where property is subject to an execution, and a fraudulent obstruction is interposed, to prevent the sale, a creditor may file his bill here to remove the obstruction as soon as he has obtained a specific lien upon the property, by the issuing of his execution. *Beck v. J. and B. C. Burdett*, 305

2. But if the property is not a subject of levy and sale on execution, the creditor must show his remedy at law exhausted by an actual return of the execution unsatisfied, before he can file a bill in this court to reach the equitable property of the debtor. *id.*

3. If such property is not a subject of sale by the sheriff, the creditor obtains no specific lien or preference until his execution is returned unsatisfied, and he has followed up his remedy by the commencement of a suit in this court, to reach the debtor's equitable assets. *id.*

4. When a debtor in failing circumstances assigns an unreasonable amount of property to satisfy a single creditor, it is evidence of fraud; but if no more than is supposed to be sufficient to satisfy the debt is assigned, a mere hypothetical reservation of the surplus. If any there should be, to the debtor, would not render the assignment void. *id.*

5. A creditor, whose execution at law has been returned unsatisfied, may file a bill to reach the equitable estate of the defendants either in his own name and for his own benefit, or he may join with other creditors standing in the same situation with himself or he may file a bill in behalf of himself and all others, being judgment creditors, whose executions have been returned unsatisfied and who may choose to come in under the decree and contribute to the expenses of the suit. *Edmeston and Riddle, ex'rs. v. Lyde and Walton*, 637

6. A judgment creditor does not obtain a specific lien upon the equitable estate of the debtor by the return of an execution unsatisfied, but by the commencement of a suit in equity after the execution has been so returned. *id.*

7. An assignment by the defendant of his property after the filing the bill in this court, will not divest the lien of the judgment creditor. *id.*

8. Where property has been fraudulently assigned by the debtor, so that he has no le-

gal or equitable rights as against the assignee, it will be necessary to make the assignee a party, to enable the court to reach the property in his hands. *id.*

9. But where the debtor still retains the legal or equitable interest in the property, such interest may be conveyed to the complainant or transferred to a receiver under the decree of the court, without making the trustee of the defendant a party. *id.*

10. The debts, choses in action and other equitable rights of the defendant may be assigned or sold under the decree of this court and the purchaser will be protected both in equity and at law. *id.*

11. Every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts. *id.*

12. While the plaintiff has the body of the defendant in execution on a *ca. sa.*, his right to proceed against the property of the latter is suspended. He cannot, therefore, as long as the defendant is so in custody, file a bill in Chancery to reach his equitable estate. *Stillwell and Bush v. Van Epps*, 615

13. An assignment by a debtor under the insolvent act transfers all his estate to the assignee, for the benefit of his creditors generally; and a judgment creditor can gain no preference in relation to such property, by a bill subsequently filed in this court. *id.*

14. After a party has proceeded to judgment and execution at law, he may, by the aid of a court of equity, reach property in the hands of a third person, which was not, in itself, liable to execution. *Candler v. Pettit*, 168

15. An injunction in such case will also be granted, to prevent the defendant from disposing of his property, after an execution has been issued and returned unsatisfied. *id.*

16. Where a creditor, having a judgment lien upon property, agreed with the vendor and purchaser to relinquish it, and take an assignment of the mortgage given for the purchase-money in lieu thereof, he is entitled to satisfaction of the mortgaged premises, to the extent of his judgment lien, in preference to an equitable claim of offset in behalf of the mortgagor, which has subsequently arisen. *Smith v. Smith and Clark*, 391

17. Under the act of Congress of the 2d of March, 1799, the United States are not entitled to a preference in the payment of bonds

given for duties, over the general creditors of the debtor, unless the debtor is actually insolvent and his insolvency is manifested by some notorious or public act. *Marshall and others v. Barclay and others*, 159

18. To entitle the United States to this preference, on account of a voluntary assignment of the property of the debtor for the benefit of his creditors, it must appear that the assignment was of all the property of the debtor, or was made with a view to defeat the claim of the United States. *id.*

19. Where, however, a debtor is actually insolvent, and intending to assign his whole property, first makes an assignment of part for the benefit of some of his creditors, and afterwards makes another assignment of the residue of his property for the benefit of his remaining creditors, the two assignments will be considered as one transaction, and the United States will be entitled to a preference. *id.*

20. Where land is sold under a decree of foreclosure and the surplus is brought into this court, judgment creditors who had obtained a specific lien thereon at law before the foreclosure are entitled to a priority of payment out of the proceeds according to the dates of their respective judgments. *Purdy v. Doyle and others*, 558

21. But if the person against whom their judgments were obtained had only an equitable estate in the mortgaged premises, so that the judgments could not bind his interest at law, the creditors here are to be paid upon the basis of equality only. *id.*

22. The rule of this court as to equitable assets is to put all the creditors on an equal footing. *id.*

23. Where assets are partly legal and partly equitable, this court cannot take away the legal preference as to the legal assets; but if one creditor has by reason of his priority been partially paid out of the legal assets, when satisfaction comes to be made out of the equitable assets, his claim thereon will be deferred until the other creditors have been paid a proportionate amount out of the equitable assets. *id.*

24. Judgment creditors have no preference over prior equitable claims against the estate of the debtor. *In the Matter of Howe*, 125

25. Thus a contract for a mortgage or the sale of real estate, has been preferred to judgments recovered subsequent to the contract. *id.*

26. As between different creditors, equality is equity. *De La Vergne v. Everton and others*, 181

27. And where there are several judgment creditors, and the land is sold under a prior mortgage, the holder of the eldest judgment, as against the others, has no greater lien upon the surplus moneys than he had upon the equity of redemption before the sale. *id.*

28. If the judgment creditors are equitably entitled to interest as against the debtor, but have no right to collect on their executions against the land, the principal of their judgments must be first paid out of the fund according to their priority, and if any thing remains, it can be applied to the payment of the interest on the several judgments ratably. *id.*

29. The depositors of money in a bank are only general creditors of the corporation, and in case of a failure of the bank, they are not entitled to a priority of payment over bill holders or other creditors. *In the matter of the Franklin Bank*, 249

30. When a bank becomes insolvent, the cashier has no lien upon the money in the bank for his deposits therein, or for the payment of his salary. *Brynn v. Receiver of the Middle District Bank*, 584

31. He has no other or greater rights than the other creditors of the institution. *id.*

32. Under the absconding and absent debtor act, an equitable interest of the debtor in real property can be attached by the sheriff, and the same passes to the assignee appointed under the act. *Lee v. Hunter*, 519

33. The surplus of the debtor's property, after all his just debts are paid, must be refunded to him. *id.*

34. But before this can be done, the creditors must be notified to exhibit their claims pursuant to the directions of the act, or they must have an opportunity of being heard. *id.*

35. The proper course for the debtor to obtain the surplus would be, to file a bill and make the trustees parties; and if they had not given the requisite notices to the creditors, notice might be given under the decree of the court, in the manner adopted of calling in creditors under a decree. *id.*

36. Where a debtor conceals his ownership of property to prevent its seizure from executions against him, and one of his judgment

creditors aids him in this fraud, this court will not interpose in favor of the debtor against such judgment creditor, but will leave the parties to their legal rights. *Manny, adm'r v. Phillips*, 472

37. Where the right to a debt due from a third person is in litigation, it cannot with safety be paid to either party after notice; but the debtor will be permitted, pending the litigation, to pay it into court to the credit of the cause. *Mills and Minion v. Pittman*, 490

38. Where a creditor has a lien upon two funds for the payment of his debt, Chancery will not compel him first to exhaust the fund which a junior creditor cannot reach, if the senior creditor will thereby be injured, or if he offers to substitute the junior creditor in his place on being paid the amount of his debt. *Woolcocks v. Hart*, 185

39. Where a judgment is given by the principal debtor to his indorsers to secure the payment of the debt for which they are responsible, and they become insolvent, the creditor is entitled to the benefit of the security. *Heath v. Hand and others*, 329

40. The judgment being given for a specific object, an assignee cannot hold it against the creditors who have a prior equity. *id.*

See ASSIGNMENT AND ASSIGNEE, 10. COSTS, 23. FRAUD, 4, 6. JUDGMENT, 18. RECEIVER, 1. WILL, 9.

DESCENT.

1. Under the statute of distributions, brothers and sisters of the half blood are entitled equally with those of the whole blood to a share in the personal estate of the intestate, without regard to the ancestor from whom it was derived. *Champlin v. Baldwin and others*, 562

2. And if such personal property had been invested in land by the intestate, the land would have descended in the same manner. *id.*

DIVORCE.

See HUSBAND AND WIFE.

DOWER.

1. If the owner of the legal estate purchases in a mortgage executed by both husband and wife, with the intention of pro-

tecting himself against the claim of dower to the extent of that incumbrance, the widow can only be endowed of the equity of redemption, and she is bound to contribute her share towards the payment of the mortgage. *Russel v. Austin*, 192

2. A defendant continues seized of his real estate sold under a judgment and execution, until the time for redemption expires; and where he dies before the time for redemption expires, his widow will be entitled to arrears of dower. *id.*

3. Arrears of dower against the purchaser of the premises in which dower is claimed, can only be recovered from the time of the purchase. *id.*

4. Where there is an outstanding mortgage upon the premises, the arrears of dower will be computed by deducting from one-third of the rents and profits, over and above the necessary repairs, taxes, &c., one-third of the interest on the amount due on the mortgage at the time the defendant acquired title to the premises. *id.*

5. Where a mortgage has been executed by husband and wife, she can only be endowed of the equity of redemption. *id.*

6. To entitle the wife to dower, the husband must have been seized during the coverture of a present freehold as well as of an estate of inheritance in the premises. *Dunham v. Osborn and others*, 634

7. Seizin of a vested remainder is not sufficient where the husband dies, or alienes his interest in the premises, during the continuance of the particular estate. *id.*

8. Where lands descend to the son, on the death of the father, and dower is assigned to the mother, if the son dies during the life of the mother, his widow can only be endowed of the remaining two-thirds. *id.*

9. But if the lands are conveyed to the son by the father, the widow of the son will be entitled to dower in the other third also after the death of the mother. *id.*

10. Where the estate has been sold on an execution against the husband, who afterwards died leaving a widow entitled to dower, the widow of the purchaser will be entitled to dower in the whole premises, subject to the dower right of the first widow in one-third thereof. *id.*

See COSTS, 19. WILL, 9.

DRUNKARD, HABITUAL.

Where a person for any considerable part of his time is intoxicated to such a degree as to deprive him of his ordinary reasoning faculties, it is *prima facie* evidence that he is incapable of managing his affairs. *In the Matter of Tracy*, 580

See COSTS, 20, 21, 22. LUNATICS, 5, 6, 7, 8, 9.

E

ESCROW.

1. It is essential to an escrow that it be delivered to a third person to be delivered to the obligee or grantee upon the happening of some event, or upon the performance of some condition. *James v. Vanderheyden*, 385

2. Where a bond and mortgage and deed were delivered to a third person to be kept by him during the pleasure of the parties, and subject to their further order, held that the papers were not escrows, and that he was a mere depository. *id.*

EVIDENCE.

1. A receipt is always susceptible of explanation. *Van Rensselaer and others v. Morris*, 13

2. An agent being dead, a written statement of an account made by him at the time of a settlement, is evidence against the principal. *id.*

3. The probate of a will of personal property, is evidence of the due execution of the will. *id.*

4. Where letters of administration, with the will annexed, are granted, and the will having been made in a foreign country, remains as a record in some public office there, the proper course is to annex an authenticated copy of the will to the letters of administration. *id.*

5. Where the purchaser of mortgaged premises had admitted the existence of the lien within twenty years, and promised to discharge the mortgage, it was held sufficient to rebut the presumption of payment arising from the lapse of time. *Park v. Peck and others*, 477

6. Such admissions of the purchaser are also legal evidence against all his judgment

creditors whose judgments have been recovered subsequent to such admissions. *id.*

7. Where the subject of the devise or legacy is described by reference to some extrinsic fact, extrinsic evidence may be resorted to, to ascertain that fact. *Pritchard v. Hicks and another, ex'rs*, 270

8. So where the words of a will are equally applicable to two persons or two things, parol evidence is admissible to show which person was the object of the testator's bounty, or which article he intended for the legatee. *id.*

9. Where a testator made a bequest to a person by a wrong Christian name, parol evidence was admitted to show what person was intended. *Connolly v. Pardon and others*, 291

10. A record cannot be read as evidence in a suit, unless both parties, or those under whom they claim, were parties to the suit in which the record was filed. *Dale and others, executors of Fulton v. Roosevelt*, 35

11. A decree in a suit, in which executors are parties, is not binding upon the heirs of their testator, unless such heirs are also parties to the suit. *id.*

12. The laws of other states must be proved, otherwise the courts of this state cannot take notice of them. *Hosford v. Nichols and others*, 220

13. Parol evidence is admissible to show that a deed, absolute in its terms, was intended by the parties as a mortgage. *Whittick v. Kane and others*, 202

14. Where the answer of the defendant is responsive to the bill, it is evidence in his favor and is conclusive, unless disproved by more than one witness. *Stafford v. Bryen*, 239

See CORPORATIONS, 14, 15. JURISDICTION IN CHANCERY, 18. PRACTICE, 53, 54.

EXECUTION.

See DEBTOR AND CREDITOR, 1, 2, 3, 5, 6. INFUNCTION, 13.

EXECUTORS.

1. If executors retain money in their hands, belonging to infants, for several years, with-

out any reason for so doing, they will be charged with the interest which they might have received thereon. *Stephens and others v. Van Buren and Wyckoff, ex'rs, &c.* 479

2. Where executors prove the will and a codicil thereto, and undertake the execution of the same, they cannot afterwards object that the codicil was not properly executed. *Pritchard v. Hicks and another, ex'rs, &c.* 270

3. The personal property of a testator must be first exhausted in the payment of his debts, before his real estate can be resorted to for that purpose. But where there is a specific lien on the land devised, as in case of a mortgage; or where the land is devised upon the condition of paying the debts; or where the debts are directed to be paid out of the estate devised; in these cases the real estate will be first resorted to, to discharge the debts. So, where it is apparent from the will that the testator's intention was that the legacies should be paid entire and the debts discharged out of other funds, the court will carry such intention into effect. *id.*

4. Where the will of a testator contains no directions as to the payment of debts, chattels specifically bequeathed must be applied to the payment of a judgment against the testator, before resort is had to the real estate devised. *id.*

5. Where a testator directed his executors to pay to one of his sons annually \$200, and also one-fifth of his estate, in case of his reformation from vicious habits, it was held that the executors acted correctly in not paying over the one-fifth of the estate, until they were satisfied of the son's complete reformation. *Dustan v. Dustan and others, ex'rs, &c.* 509

6. And where a suit to compel such payment had been pending some time, and the executors in their answer expressed a desire and willingness to pay over the money under the direction of the court, it was referred to a master to inquire and report whether a permanent reformation had taken place. *id.*

7. And where the executors not being satisfied of such reformation, had refused to pay over the one-fifth of the estate, they were allowed their costs of defending the suit commenced to compel such payment. *id.*

8. If an executor or administrator commences a suit in Chancery in good faith, upon probable grounds of right, and to enforce a supposed claim of the testator or intestate, he will not be charged with costs. *Manny, adm'r. v. Phillips,* 472

9. But if he bring a suit in this court merely to aid a defence at law, he cannot, in case of failure, be excused from costs here, in a case in which costs would be given against him in a suit at law. *id.*

10. Where an executor upon sufficient grounds applies to the court for direction, he will be permitted to retain the costs of the application out of the property of the testator, not specifically bequeathed. *id.*

11. Where executors or administrators, without any sufficient excuse, refuse to pay over to the general guardian funds belonging to infants, they may be personally charged with costs. *Stephens and others v. Van Buren and Wyckoff, ex'rs,* 479

12. Where an executor or administrator has commenced a wrong suit by mistake, or has ascertained that it would be useless to proceed in consequence of facts subsequently discovered, he will be permitted to discontinue without the payment of costs. *Arnoux v. Steinbrenner and others,* 82

13. Where executors, who have no interest in the question, are made defendants in Chancery, they are entitled to their costs out of the fund. *Delafield and others v. Colden and others,* 139

14. And if there is a fair question for litigation, and he does nothing more than his duty in attending to their interests, he will be allowed his costs out of the fund belonging to them. *Pritchard v. Hicks and another, ex'rs, &c.* 270

See PRINCIPAL AND AGENT, 3. SUREGATE, 2, 3, 4, 5, 6. TRUST AND TRUSTEE, 3, 4, 5. WILL, 1, 2.

F

FRAUD.

1. Where a judgment was entered on a bond and warrant, and a specification was filed under the act of April 21st, 1818, and it appeared no such consideration as that stated in the specification existed, the judgment was declared fraudulent and void as against other judgment creditors. *White v. Williams and others,* 502

2. If a judgment is void as against a subsequent judgment creditor, it is also void as against a purchaser under the subsequent judgment. *id.*

3. Pending a treaty of purchase, a third

person took a confession of judgment from the vendor, and fraudulently concealed the fact from the vendee until after the sale, for the purpose of enforcing the judgment against the land in his hands. On a bill filed against the judgment creditor and his assignee, they were decreed to release the land from the lien of the judgment. *Webster v. Wise and Ford*, 319

4. If a purchaser who is insolvent, concealing his insolvency from the vendor obtains goods from him without intending to pay for them, it is a fraud upon the vendor, and the property in the goods will not be changed. *Durell and others v. Haley and Turner*, 492

5. But if the goods have been resold by the fraudulent vendee to a *bona fide* purchaser who has actually paid for the same without notice of the fraud, such purchaser will be protected. *id.*

6. Where an insolvent confessed a judgment to his friend, on which an execution immediately issued, and then purchased goods for the purpose of subjecting them to the execution, it was held to be a fraud upon the vendor, and the judgment creditor was not permitted to retain the goods, which had been purchased in by him upon his execution. *id.*

7. Thomas L. and J. L. were owners of a farm in Orange county, which, in 1811, was, by a fraud upon them, mortgaged to R. The mortgage was foreclosed in Chancery, and the farm advertised for sale by a master. Before the sale, B., by an arrangement with Thomas L. and J. L., agreed to purchase in the farm for their benefit, for which he was to receive a stipulated compensation. R., the mortgagee, in order to favor Thomas L. and J. L., agreed with B. that he might bid off the property for \$1,500, about half the amount of the mortgage. B., at the sale, prevented others bidding, by representing that he intended to buy for Thomas L. and J. L. B. purchased the farm at the master's sale for \$1,540, about \$1,000 below its value. Afterwards B. refused to convey the farm to Thomas L. and J. L., or to account to them for the value, although they tendered to him the amount of his bid, with interest, and the sum agreed to be paid for his services. It was held that B. was a trustee for Thomas L. and J. L., and had no other interest in the farm than that of a mortgagee to secure the repayment of the purchase-money, and the payment of the sum agreed to be allowed him for his services. *Brown v. Lynch and Lynch*, 147

8. Where S. being indebted to several persons, was in September, 1817, sued for a default in paying over moneys received as a commissioner of loans, and judgment was recovered against him on the 31st of January, 1818, and on the 1st of January, 1818, S. conveyed to L. his farm and all his personal property for the nominal consideration of \$8,501 25, \$4,000 of which was paid in Virginia lands which had been purchased by L. 20 years before, but which he had never seen or possessed, and there was no proof of the payment of the residue of the consideration, and S. continued in possession of the property so conveyed to L. it was held that this conveyance was fraudulent and void as against the creditors of S. *Lee v. Hunter and Hallenbeck*, 519

9. Where the defendant, by a fraudulent overdraw, obtained the complainant's money and deposited it to his own credit in another institution, held, that the title to the property was not changed, and might be reclaimed by the owners. *The Trademan's Bank and the Chemical Bank v. Merritt*, 302

10. A court of chancery relieve against a fraud, by converting the person guilty of it into a trustee for those who have been injured thereby. *Brown v. Lynch and Lynch*, 147

See AGREEMENT, 1.

G

GIFT.

1. A promissory note or a bond is a proper subject of a gift, *causa mortis*; and the delivery may be to a third person for the use of the intended donee. *Constant v. Schuyler and others*, 316

2. But claims of this kind are admitted with great caution; and where some doubt was thrown on the transaction, a feigned issue was awarded. *id.*

GUARDIAN AND WARD.

1. Fixed habits of intemperance constitute a sufficient reason for the removal of a guardian. *Kettleas and wife v. Gardner and wife*, 488

2. And it is improper that the wife of a husband addicted to such habits should be the guardian, she being subject to his control. *id.*

3. An adult husband is entitled to the guardianship of the person of his wife during her minority. *id.* such a decree as is most for her benefit. *Fabre and wife v. Colden*, 166

4. The court will protect the rights of infants where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf. *Stephens and others v. Van Buren and Wyckoff ex'rs.* 479

HI

HEIRS AND DEVISEES.

See JUDGMENT, 15, 16.

HUSBAND AND WIFE.

1. The wife's equity to a support for herself and children out of her estate, which has not been reduced into possession by the husband, is paramount to the rights of the assignee of the husband under the insolvent act. *Mumford and others v. Murray*, 620

2. Where the property of the wife is in the hands of an officer of the Court of Chancery, she may apply by petition for a reasonable allowance out of such estate. *id.*

3. But if she has appropriated to her own use property which belonged to the assignee, the amount thereof must be refunded to him out of her estate. *id.*

4. Where the wife was entitled to an equitable allowance out of the separate estate of her husband, who was a lunatic, but of whose person and estate no committee had been appointed, the court ordered her separate property to be transferred to the assistant register, and that the income thereof be paid to her upon her separate receipt, until the further order of the court. *F. Carter v. J. K. Carter*, 463

5. A wife may compromise a suit brought against her husband for a divorce; and the court will only interfere so far as to see that she is not overreached or imposed upon in the settlement. *Kirby v. Kirby*, 565

6. The solicitor for the wife cannot insist upon proceeding with the suit against her consent, upon the ground that his costs are not paid. *id.*

7. Where the husband applies to a court of equity for the control of his wife's property, the court will protect her interests, and make

8. This court will not decree a specific performance of an agreement made by a husband in relation to the real estate of his wife, to which she was not a party. *Squire and wife v. Harder and others*, 494

9. He can make no agreement which will affect her rights, without her consent. *id.*

10. An adult husband may file a bill in Chancery for the partition of his wife's estate, although she is an infant. *Sears and wife v. Hyer and others*, 483

11. He has a valid and subsisting interest of his own in the premises, and may therefore join with her in the suit. *id.*

12. Where lands of the wife who is an infant are sold under a decree in partition, the husband is not entitled to the proceeds, but the court will secure the fund for her use until she becomes of age and consents to his receiving the same. *id.*

13. Where a bill is filed against husband and wife, the husband is bound to enter a joint appearance, and put in a joint answer for both. *Leavitt v. Cruger and wife*, 421

14. But if the wife refuses to join in an answer or a plea, the husband will be permitted to put in either separately. *id.*

15. The service of a subpoena upon the wife, is only necessary where the proceeding is against her in respect to her separate estate. *id.*

16. In a suit brought by either husband or wife for a divorce, on the ground of adultery, the wife prosecutes and defends without a guardian or next friend as a *feme sole*; and her affidavit is admissible against the husband, as to any matter or proceeding in the cause. *Kirby v. Kirby*, 261

17. An injunction, a receiver and a writ of *ne exeat*, may all be resorted to in the same suit, to aid the court in doing justice between the parties. *id.*

18. A husband, by committing adultery, subjects himself and his property to the jurisdiction of the Court of Chancery, so far as to enable the court to order his property to be applied to the support of his family, both during the litigation and afterwards. *id.*

19. And the power of the court extends

to compelling the husband to apply a portion of his daily earnings to the same object, during the pendency of the suit. *id.*

20. The Court of Chancery has no power to decree an absolute or a partial dissolution of the marriage contract, even with the consent of the parties, except in the special cases provided for by statute. *Palmer v. Palmer*, 276

21. Neither the act of 1813, concerning divorces, (2 R. L. 200,) nor the act of April, 1824, (6 vol. *Laws of New York*,) confers upon the Court of Chancery power to grant a divorce, *a mensa et thoro*, unless the charges contained in the complainant's bill are satisfactorily established. *id.*

22. The usual course, where the bill is taken as confessed, is to order a reference to a master to report as to the facts. *id.*

23. If the bill is filed by the husband for a divorce, *a mensa et thoro*, and he obtains a decree, the wife will not be entitled to a maintenance out of his property. *id.*

24. Where the husband filed a bill against his wife for a divorce, *a mensa et thoro* and the wife in her answer denied every allegation of improper conduct charged in the complainant's bill, and also set up cruel and inhuman conduct on the part of her husband towards her, and in consequence thereof consented to a decree of separation from bed and board forever, in which a suitable provision should be made for herself and children, the court refused to decree a divorce from bed and board. *id.*

25. Where a divorce was decreed in a suit brought by the wife against her husband for adultery, an annuity equal to the annual value of one-third of the husband's property, at six per cent. was allowed to the wife during her natural life, for her alimony. *Peckford v. Peckford*, 274

26. If her conduct had been discreet, prudent and submissive to her husband, the allowance to her would have been greater. *id.*

27. Where a bill was filed by a husband against his wife for a divorce, and a monthly allowance was ordered to be made to the wife by the husband, for alimony during the pendency of the suit, it was held, that she was entitled to this allowance up to the termination of the suit by a final decree, and not merely to the time of the trial which resulted in her favor. *Germond v. Germond*, 83

28. Where the decree is in favor of the wife, she will be allowed against her husband her costs, and all the reasonable disbursements and expenses made in her defence. *id.*

See GUARDIAN AND WARD, 3. PRACTICE, 65.

I

INFANT.

1. Where the person who prosecutes a suit in the name of an infant, as his next friend, is insolvent, he will be compelled, on the application of the defendant, to give security for costs. *Fulton and others v. Rosevell*, 178

2. A suit may be commenced in the name of an infant without his knowledge or consent. The court, however, on a proper application, will refer it to a master to ascertain whether such suit is for the benefit of the infant, and if the master reports that it is not for his benefit, will stay the proceedings. *id.*

3. It seems an infant, who has no means of indemnifying a responsible person for costs, will be permitted to sue by his next friend in *forma pauperis*. The court however will, in the first place, see there is probable cause for the proceeding, and will appoint a proper person as *prochein amy*. *id.*

See GUARDIAN AND WARD, 4.

INFORMATION.

See CORPORATIONS, 20.

INJUNCTION.

1. An injunction is not waived by a delay in applying for an attachment for its violation. *Dale and others, ex'rs of Fulton v. Rosevell*, 35

2. Where executors obtained a decree for a perpetual injunction, restraining R. from suing or prosecuting any action at law against such executors or other representatives of their testator, for the recovery of the arrears of an annuity; held, that the prosecution of a suit at law against the heirs of the testator, who were not parties to the suit in this court, to recover the same annuity, was not a breach of the injunction. There is no privity between an executor and the heir or devisee of the land. *id.*

3. An injunction will lie to restrain trespasses in order to quiet the possession, or

where there is danger of irreparable mischief, or the value of the inheritance is put in jeopardy. *The N. Y. Printing and Dying Establishment v. Fitch*, 97

4. A preliminary injunction before answer, rests in the discretion of the court, and ought not to be granted, unless the injury is pressing and the delay dangerous. *id.*

5. It will not be granted to restrain a party from running a steamboat, and landing their passengers at the dock of another. *id.*

6. Whether a court of equity have any jurisdiction in such a case? *Quere.* *id.*

7. There are many cases in which a complainant would be entitled to a perpetual injunction upon the hearing, where it would be improper to grant him a preliminary injunction. *id.*

8. The answers of all the defendants in a suit must be perfected before an injunction will be dissolved, provided all the defendants are implicated in the same charge, and the complainant has taken the requisite steps to compel the answers. *Noble and others v. Wilson and others*, 164

9. And where exceptions to the answer of one of the defendants are submitted to, if the exceptions go to the merits, an injunction will not be dissolved. *id.*

10. The same rule holds where the exceptions are allowed by the master. *id.*

11. If the exceptions to the answer have not been submitted to by the defendant, nor allowed by the master, the court will look into them to see they are not frivolous. *id.*

12. If frivolous, they will furnish an objection to a motion to dissolve an injunction. *id.*

13. Where the sheriff had levied on perishable property, and the execution was stayed by injunction, the Chancellor allowed him to sell the property and pay the proceeds to the register, to abide the further order of the court. *Heath v. Hand and others*, 329

14. Where the complainant suffered three years to elapse without compelling an answer from one of several defendants, and the other defendants in their answer charged collusion between the complainant and the defendant who had not answered; it was held, that under such circumstances, the fact that all the defendants had not answered, could not be

urged as an objection to the dissolution of an injunction, unless the complainant denied, upon affidavit, all collusion, and stated sufficient reasons for not compelling an answer from all the defendants. *Ward v. Van Bokkelen*, 100

15. A defendant cannot object that another person, not a party to the suit, is also enjoined. *The Tradesman's Bank and Chemical Bank v. Merrill*, 302

16. If such a person makes a proper application, the court will discharge the injunction, so far as it affects his interest. *id.*

17. An injunction against a corporation cannot be dissolved on bill and answer, unless the answer is duly verified by the oath of some of the corporators who are acquainted with the facts stated therein. *The Fulton Bank v. The N. Y. and Sharon Canal Company and others*, 311

18. Where the equity of an injunction bill is not charged to be in the knowledge of the defendant, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone. *N. Rodgers and others v. H. Rodgers and others*, 426

19. Where a bill is filed to restrain proceedings on a judgment recovered at law, the court will not require the complainant to bring the amount of the judgment into court, unless it is shown there is danger of the complainant's insolvency. *id.*

20. And where hydraulic works are erected on both banks, the owners of the works are each entitled to an equal share of the water. If the owner of the mills on either side attempts to deprive the other of the use of his share of the water, of which he has been in the quiet enjoyment, and thus to destroy his mills, a preliminary injunction will be granted, as the injury might be irreparable. *Arthur and Wright v. Case and Harwood*, 477

21. An injunction on coming in of the answer will not be dissolved, unless the defendants positively deny all the equity of the bill. A denial from information and belief is not sufficient. *Ward v. Van Bokkelen*, 100

22. On a motion to dissolve an injunction, the court will not listen to an objection of misjoinder of complainants, where the merits of the case are clearly against the defendant. *The Tradesman's Bank and Chemical Bank v. Merrill*, 302

23. Where a deposit is made upon obtaining an injunction, by way of security for costs, the right to the money cannot be decided until the final hearing of the cause on the merits. *Leggitt v. Dubois and Walton*, 544

24. The defendant is not entitled to the deposit immediately upon a dissolution of the injunction on bill and answer. *id.*

See BANKRUPT, 2, 3. CORPORATIONS, 19, 20. DEBTOR AND CREDITOR, 15. PRACTICE, 41, 42. USURY, 4, 5.

INTEREST.

1. Where a contract is made in reference to the laws of another country, and is to be performed there, the interest is to be calculated agreeably to the laws of the place where the contract is to be performed. *Hosford v. Nichols and others*, 220

2. As a general rule, interest is payable according to the laws of the place where the contract is made. *id.*

J

JUDICIAL SALE.

1. A *bona fide* purchaser of property at a judicial sale, under the order of a court having jurisdiction of the subject matter is always protected, where the proceedings are only voidable, not void. *American Ins. Co. v. Fisk*, 90

2. And courts ought to be liberal in sustaining the regularity of such sales where there exists no doubt as to the fairness and official nature of the transaction. *id.*

3. The courts are likewise protected, whose proceedings have been irregular, where they have jurisdiction of the subject matter. *id.*

JUDGMENT.

1. Where certain lands upon which a judgment is a lien are advertised for sale under such judgment, part of which lands have been previously sold by the debtor, and there are other lands of the debtor unsold, but the lien of the judgment would expire before such other lands could be advertised and sold, the owner of the judgment in such case, would not be bound upon the requisition of the purchaser from the debtor to abandon the sale of the lands so advertised. *James v. Hubbard and others*, 228

2. The proper course of such purchaser would be to offer to pay the amount of such judgment and to take an assignment of the same; and then by filing a bill against all the parties in interest before the expiration of the lien of the judgment, it seems such purchaser would be able to preserve the lien so far as to compel contribution upon equitable principles. *id.*

3. A judgment creditor cannot enforce his judgment against the land of a subsequent purchaser, so long as there are other lands of the debtor sufficient to satisfy the judgment. *id.*

4. Where there are successive purchasers there is no contribution, and their lands are chargeable with the judgment against the debtor in the inverse order of alienation; that is, the lands last sold are to be first charged. *id.*

5. In such cases the equities between the several purchasers are equal, yet the first purchaser, having the prior equity, is preferred. *id.*

6. The priority of equity is not determined by the date of the conveyance, but by the contract for the purchase of the land and the payment for the same. *id.*

7. A judgment creditor is not bound to decide at his peril upon the equitable rights of the owners of different portions of the land upon which he has a lien. *id.*

8. If the land of the purchaser who has a prior equity is first sold, he can compel the other purchasers to refund to him the amount they were benefited by such sale. *id.*

9. If a judgment creditor discharges from the lien of his judgment a part of the lands which ought to be first resorted to, the owner of other parts of the lands who has a prior equity will be entitled to a deduction from the judgment of the value of the lands so discharged, before his lands are resorted to for the satisfaction of such judgment. *id.*

10. Where certain lands, belonging to E., were sold under a loan office mortgage, and W., by request, bid off the same for E., E. being absent: E., a few days after the sale, refunded the money to W. At the time of the sale T., one of the commissioners of loans, held a judgment against W.; T., together with his co-commissioner, in June, 1819, executed a deed to W.; in March, 1819, T. issued an execution against W., and in August, 1824, caused the mortgaged premises to be sold under judgment, and bid in the same

himself. In September, 1819, W. executed to E. a release of all his interest in the premises; and it was agreed between them that no deed should be executed to W. by the commissioners. T. purchased in the premises under his judgment, with a full knowledge of E.'s rights. Held, that the purchase by T. could not be sustained, and that he could not retain the lien of his judgment upon the premises. *Ellis v. Tousley*, 280

11. Under these circumstances, if the deed had been executed by the commissioners at the time of the sale, the title would have been in E. as a resulting trust, and W. could only have held the deed as a security by way of mortgage for the money advanced by him. *id.*

12. The lien of a judgment does not in equity attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person. *id.*

13. And if a purchaser under the judgment has notice of the equitable title before his purchase and the actual payment of the money, he cannot protect himself as a *bona fide* purchaser. *id.*

14. A payment on a judgment discharges the lien on the land to the extent of the payment; and the lien cannot be restored by any subsequent agreement between the parties. *De La Vergne v. Evertson and others*, 181

15. A bill filed in this court against heirs or devisees, has the same effect as the commencement of a suit at law in preventing the alienation of the estate. But if a judgment at law is obtained before the decree in this court, the plaintiff in such judgment thereby obtains a prior lien on the legal estate in the hands of the heirs or devisees. *Purdy v. Doyle and others*, 558

16. Where a suit is commenced against five heirs for the debt of their ancestor, and the writ is only served upon three, but the plaintiff proceeds and takes judgment against all as joint debtors, he obtains a lien only upon the estate of those upon whom the process was served. *id.*

17. Where a creditor has obtained a lien upon real estate by a judgment at law, if he subsequently brings an action of debt on his judgment, and recovers a new judgment, he will lose his first lien. *id.*

18. Where a debtor who gave to his indorser a judgment for his security, and after-

wards another person became the indorser in the place of the former one, and took an assignment of the judgment as his security, with the assent of the debtor, held that such judgment was valid, and took priority over a junior judgment, although the assignee of the first judgment was not compelled to pay the notes indorsed by him until after the docketing of the junior judgment. *Norton v. Whiting and others*, 578

19. The purchaser of lands under a judgment obtains all the right of the defendant to the premises, and no equity can be set up against him on account of notice which did not affect the title to the land in the hands of the judgment debtor. *Sweet v. Green*, 473

20. A judgment is not a specific lien upon the real estate of the debtor. *Rogers and others v. Rogers and others*, 188

21. In Chancery, a judgment recovered in a court of law is considered as binding upon the real parties in the suit, although not the nominal parties on the record. *Southgate v. Montgomery and Eivers*, 41

See ASSIGNMENT AND ASSIGNEE, 9. DEBTOR AND CREDITOR, 7, 16, 20, 21, 24, 25, 27, 28, 39, 40. FRAUD, 1, 2, 3. INJUNCTION, 19.

JURISDICTION OF CHANCERY.

1. Where two parties submit their differences to arbitrators, and agree to make the submission a rule of court, in a court of common law, pursuant to the act for determining differences by arbitrators, (1 R. L. 125,) the Court of Chancery will not entertain jurisdiction to set aside the award, unless injustice would be done. *Tappan v. Heath*, 293

2. Although a person has a perfect remedy at law to recover for the breach of an agreement connected with a note, if he cannot avail himself of it as a defence to an action on the note, he can come into Chancery to have the note cancelled, and to recover the balance, if any, which may be due him. *Reed v. Bank of Newburgh*, 215

3. Where certain persons are invested by statute with discretionary powers, Chancery will not interfere to correct mere errors of judgment, if the powers conferred have not been illegally or unconscientiously exercised. *Phillips and others v. Wickham and others*, 590

4. Where a sheriff, after collecting money on an execution, died insolvent, without pay-

ing over the same, and no person administered upon his estate, it was held that no suit could be sustained in Chancery against the sureties of the sheriff upon his bond, to enforce the payment of the amount so collected by him. *Bank of Utica v. Dril and Cumpston*, 486

5. If the judgment creditor has any remedy in such cases, the Supreme Court alone can furnish relief. *id.*

6. Wherever the remedy at law is doubtful and difficult, a court of chancery has jurisdiction. *American Ins. Co. v. Fisk*, 90

7. The act of Congress of March 3d, 1823, does not give exclusive jurisdiction of salvage and admiralty causes to the superior courts of the territory of Florida, organized by that act; and an act of the legislature of that territory, creating a wrecker's court, is valid. *id.*

8. Where such court in making an award, made an order not within their jurisdiction, it was held that this excess of jurisdiction only rendered the award void *pro tanto*. *id.*

9. Courts of law have concurrent jurisdiction with the Court of Chancery in the examination of accounts between parties. *Southgate v. Montgomery and Eivers*, 41

10. Where a party has elected a court of law as the forum for the examination of the accounts, after a decision in such court of law, he cannot come into a court of equity and have the same accounts re-examined. *id.*

11. Where there existed mutual accounts between M. and E., and E. sued M. in a foreign court for a settlement, and judgment was rendered against E., and afterwards a suit pending in the Supreme Court of this state, commenced and prosecuted by the assignees of M. in the name of M. against E., was referred to referees, who reported a balance due to E. from M., on which report judgment was entered in favor of E., it was held, that the judgment against E. in the foreign court was not binding upon E. as between him and the assignees of M., and that if that judgment was binding upon E., as it was known to the assignees previous to the hearing before the referees, it should have been insisted upon by them at that hearing, and could not afterwards be a ground of relief in this court. *id.*

12. The Court of Chancery has no power to review upon the merits the proceedings of the commissioners of estimate and assessment of

damages in opening streets in the city of New York. *Patterson v. The Mayor, &c., of the City of New York and Peters*, 114

13. Where the commissioners, after they had deposited a copy of their report in the clerk's office, pursuant to the 182d sec. of the act of the 9th of April 1813, (2 R. L. 417,) altered their assessment of damages, it was held not to be necessary to deposit a new copy of their report in the clerk's office or to publish a new notice to propose objections to the assessment. *id.*

14. But if it was necessary to file a new copy of the report and publish a new notice, the omission to do so would only render the proceedings voidable; in which case, the remedy would be by *certiorari*. *id.*

15. The Court of Chancery has no jurisdiction in such cases, unless the proceedings are wholly void. *id.*

16. This court has jurisdiction to set aside and cancel deeds and other instruments fraudulently obtained, and which are attempted to be set up inequitably. *Thompson, ex'rs v. Graham and others*, 384

17. A court of chancery has jurisdiction to correct mistakes in policies of insurance as well as in all other written instruments. *Phoenix Ins. Co. v. Gurnee*, 278

18. The evidence of the mistake in all cases should be clear and satisfactory. *id.*

19. Where a party by erecting a dam raises a stream of water above its natural level, so as to materially injure mills above, on the same stream, a court of chancery will decree that the dam be lowered, and that the party erecting the same pay all the damages occasioned by raising the water above its natural level. *Hammond and others v. Fuller and others*, 197

20. Where there are difficulties in relation to an off-set at law, relief will be granted to the party claiming the off-set, in Chancery. *McLaren v. Pennington and others*, 103

21. Where, to determine the liability of parties, it is necessary to require the accounts of several estates, it would seem that the Court of Chancery alone has jurisdiction. *Foster and Bouck, ex'rs, &c. v. Wilber and Olmstead*, 537

See HUSBAND AND WIFE, 18, 19, 21. SET-OFF, 11, 14, 15.

L

LEASE.

1. A covenant on the part of the lessor to renew a lease for years at the expiration of the term, is a covenant running with the land. *Piggot v. Mason*, 412

2. A surrender and conveyance to the lessor of a sub-lease of part of the premises, is no bar to a claim on the part of the lessee or his assigns for a renewal of the original lease agreeable to the covenant. *id.*

3. The holder of the original lease is not entitled to a covenant for renewal in the new lease, as that would create a perpetuity. *id.*

4. Covenants of warranty and to convey contained in a lease of real estate, run with the land, and are binding upon the heirs and assignees of the lessor. *Van Horne v. Crain*, 455

5. A subsequent purchase by the lessor of an outstanding claim against the premises, will enure to the benefit of the lessee by virtue of the covenant of warranty. *id.*

6. The same result follows where the purchase is made by an assignee of the reversion. *id.*

LEGACY.

1. It is a general rule, that a residuary legatee, or other person prosecuting for a distributive share of the estate, should make all the other persons interested in the distribution, parties to the suit, in order that only one account be taken. *Pritchard v. Hicks and another, ex'rs, &c.* 270

2. But this is not necessary where a creditor or legatee prosecutes, who is entitled to a priority of payment. The executor or administrator in such cases is the legal representative of the residuary legatees, and it is his duty to protect their rights. *id.*

3. Where there is a bequest in remainder after the determination of a particular estate, with an executory limitation over in case of the death of the legatee, the legatee takes only a contingent interest, which will be divested if he dies during the continuance of the particular estate, and the limitation over will take effect. *Adams v. Beekman and others*, 631

4. Where several suits are brought by different legatees for general legacies, and the

estate is insufficient to pay them all, the court will direct an account of the estate to be taken in one cause only, and in the meantime direct the proceedings in all the other suits to be stayed. *Ross and wife v. Crary, ex'r*, 416

5. It is a matter of discretion as to which suit the account shall be taken in. The court will therefore direct the suit which is most beneficial for the legatees to be proceeded in, and if there is doubt on that subject, will refer it to a master to ascertain which suit is most for the interest of the legatees and other persons interested in the estate. *id.*

6. Where a testator devised his real and personal estate to two of his sons, provided they should pay certain legacies given in the will, and the legatees filed their bill against them and obtained a decree for the sale of the real estate to pay the legacies, which, upon being sold, proved insufficient; and no decree having been asked in that suit, charging the devisees personally with the payment, held, that the legatees could not file a new bill against them for that purpose. *Cook v. Grant, adm'r*, 407

7. The legatees should have asked and obtained all the relief to which they were entitled against the devisees in the first suit. *id.*

8. Where a testator devised certain real estate to his widow for life, or during her widowhood, and, after her death or marriage, devised the same to his nephew in fee, provided he paid the legacies mentioned in the will, and directed that the legacies should be paid by the nephew, his heirs, executors, or administrators, whenever he or they should come into possession of the premises devised, it was held, that a payment of the legacies was a condition of the devise; and that if the devisee or his heirs should refuse to accept the devise and pay the legacies, the estate would descend to the heirs at law of the testator, but it would, in equity, be chargeable with the payment of the legacies. *Birdsall, adm'r v. Hewlitt and others*, 82

9. If the devisee accepts the devise, he becomes personally liable for the legacies. *id.*

10. The legacies, however, are, notwithstanding the personal liability of the devisee, an equitable charge upon the estate. *id.*

11. It is a general rule, that legacies chargeable upon the real estate and payable at a future day, are not vested, and lapse by the death of the legatee before the time of payment arrives. *id.*

12. But this rule has never been extended to a case where the estate was given to a stranger, upon condition that he paid the legacy charged thereon; and the rule has been much limited, even as between the legatees and heirs at law. *id.*

13. Where the time of payment of the legacy is postponed for the benefit of the estate, and not with reference to any particular circumstances in relation to the legatee, the legacy becomes vested at the death of the testator, and is transmissible to the personal representatives of the legatee, although he dies before the time of payment arrives. *id.*

14. A legacy carries interest from the time it becomes payable. *id.*

See COSTS, 31. WILL, 8.

LIEN.

1. A grantor of lands has an equitable lien on the estate sold for the payment of the purchase-money; and this lien is not waived by the grantor's taking the mere personal security of the purchaser only, unless there is an express agreement between the parties that the equitable lien be waived. But wherever any security is taken on the land sold, or otherwise, for the whole or a part of the purchase-money, the equitable lien will be waived, unless there is an express agreement that it shall be retained. *Fish v. Howland and others*, 20

2. So the lien is waived where a note or bond is taken of the vendee for the purchase-money, in which a third person joins as security. *id.*

3. Likewise, if the vendee sells to a third person, without notice, the lien is lost. *id.*

4. Where upon a sale of lands the negotiable note of the purchaser is given for the purchase-money, the vendor retains an equitable lien upon the land; but an indorsee is not, from the mere transfer of the note, entitled to the benefit of such lien, where the indorser has not been made liable upon his indorsement. *White v. Williams and others*, 502

See FRAUD, 3. JUDGMENT, 1, 2, 9, 10, 12, 14, 15, 16, 17.

LIMITATIONS, STATUTE OF.

1. Where a legacy to a daughter was payable on her marriage, or when she became of

age, and she married before arriving at full age, in a suit brought by her and her husband for the legacy, after the lapse of six years, it was held that the statute of limitations did not run against her, she coming within the exception in the statute in favor of *fenes covert*. *Wood and wife v. The Executors of Riker*, 616

2. Where the statute of limitations is a good defence to only a part of the complainant's demand, if pleaded as a bar to the whole, the plea will be bad. *id.*

3. Twenty years, by analogy to the statute of limitations, is the period allowed in Chancery for commencing proceedings to set aside conveyances of real estate on the ground of fraud. *Ward v. Van Bokkelen*, 100

4. The statute of limitations is a good plea in bar in equity as well as at law. *Stagford v. Bryan*, 239

5. Twenty years are required to bar an equity of redemption. *Slee v. The President and Directors of the Manhattan Company*. 48

LUNATICS.

1. It is the privilege of a party against whom a commission of lunacy is issued, to be present at, and to have notice of its execution. *In the matter of Tracy*. 580

2. If peculiar circumstances render it improper or unsafe to give such notice, they should be stated in the petition to the court, so that a special provision may be inserted in the commission dispensing with notice to the party. *id.*

3. In this state it is not a matter of course to allow an inquisition to be traversed, but the same rests in the sound discretion of the court. *id.*

4. The practice here is to award a signed issue in all cases where a traverse would be proper, instead of allowing a formal traverse. *id.*

5. An issue should be directed upon the application of the party in all cases of doubt, especially under the act respecting habitual drunkards. *id.*

6. Whether any, and what allowance will be made to a party out of his estate in the hands of a committee, depends upon the circumstances of each particular case. *id.*

7. On the execution of a commission in the

nature of a writ *de lunatico inquirendo*, it is improper for the sheriff who summoned the jury to be in the room, or to converse on the subject with the jury while they are deliberating on their verdict. *In the matter of Arn-hout*, 497

8. Where the sheriff had improperly interfered with the deliberations of the jury, their inquisition was set aside and a new commission was issued directed to the coroners. *id.*

9. Duty of commissioners on executing commission of lunacy, and instructions to be given to the jury. *id.*

See HUSBAND AND WIFE, 4.

M

MERGER.

See MORTGAGE, 9.

MORTGAGE

1. S. being indebted to the Manhattan Company, upon a note to the amount of \$2,000, and also being in embarrassed circumstances, upon the application of the directors of the company, in order to secure the amount due to the company, he assigned to them a bond and mortgage for \$4,000, which he held upon a house and lot in Poughkeepsie, against F. & H. The assignment was made with the express understanding that the surplus, after satisfying the debt of the company, should belong to S. The assignment stated that S., for the sum of \$2,000, assigned the bond and mortgage to the Manhattan Company, with power to collect the sum of \$2,000 for their own use, and contained a covenant on the part of S., that \$2,000 was due on the mortgage, and that the mortgaged premises should sell for that sum and the interest and costs. In 1817, the Manhattan Company foreclosed the mortgage, and caused the mortgaged premises to be bid in for \$700. Previous to the sale, S. was told by the agent of the company, that if the company purchased in the property, it should remain as it then was as to him, S. merely foreclosing F. & H. S. always insisted upon his right to redeem, and in 1825 made a direct application for that purpose, and offered to pay all that was justly due the company. The company refused to permit him to redeem. It was held that the assignment from S. to the Manhattan Company was a mortgage, and even if it had been in form an absolute assignment of the whole interest of S. in the bond and mortgage against F. & H., that in equity it would have been a mere security for

the payment of the debt due the Manhattan Company; that the Manhattan Company had a perfect right to foreclose the mortgage under the statute, for the purpose of barring the equity of redemption which existed in F. & H.; that the assignment by S. to the Manhattan Company was a mortgage of the power of sale, as well as a mortgage of the debt; that if a stranger had purchased the mortgaged premises upon the sale thereof, the right of S. to redeem the same would have been gone, but not his right to redeem the second mortgage created by the assignment, which right would then attach itself to the purchase-money instead of the land; that as the Manhattan Company were the purchasers of the mortgaged premises, the right of S. to redeem the said premises remained undisturbed, the legal estate of said premises continuing undivested in the Manhattan Company: that the assignment of the bond and mortgage to the Manhattan Company being itself a subsisting mortgage, and S.'s equity of redemption not being divested by the statute foreclosure, the question of waiver on account of lapse of time did not arise. *See v. Manhattan Company*, 48

2. An assignment of a land contract for the security of a debt due the assignee, upon the condition that if the debt was paid at the time stipulated, the assignee should re-assign the contract, is, in equity, a mortgage, and the assignor has a right of redemption. *Brockway v. Wells*, 617

3. An agreement for a mortgage, is, in equity, a specific lien on the land. *In the Matter of Howe*, 126

4. Where an instrument in writing was duly executed, conveying certain lands to the grantee, his executors, administrators and assigns, for and during the term of one year, yielding and paying therefor yearly lawful interest of seven per cent. during said term of one year, and in and upon the 14th of November, 1810, with a condition to be void on the payment by the grantor of 600*l.* to the grantee, on the 14th of November, 1810, containing also a covenant on the part of the grantor, to pay the 600*l.* and interest at the time above mentioned, the same was held to be a good and valid mortgage and security in equity, for the sum covenanted in the instrument to be paid by the grantor. *Elliot, ex'r, v. Pell and others*, 263

5. And such instrument would be valid and binding against all persons chargeable with notice of the same. *id.*

6. *Bona fide* purchasers without notice, who have actually paid the purchase-money, can-

not be disturbed in their title to the premises purchased, where the deed intended as a mortgage is absolute on its face. *Whittick v. Kane and others*, 202

7. In such cases, the remedy of the mortgagor is personal against the mortgagee and his legal representatives for the moneys received on the sale of the mortgaged premises. *id.*

8. In taking and stating an account of the amount due on such mortgage, the mortgagee will be charged with the rents and profits of the mortgaged premises, from the time he took possession, and also with the amount of the purchase-money received by him on the sale of the premises, together with interest thereon to the time of stating the account. *id.*

9. Where the owner of the legal estate takes an assignment of an outstanding mortgage, there will be no merger of the mortgage unless the owner of the legal estate so intended when he purchased the mortgage. *Russell v. Austin*, 192

10. Where a mortgagee parts with all his interest in the mortgage to a third person, but does not assign it, and he afterwards obtains his discharge under the insolvent laws, the mortgage will not pass to his assignees under those laws. *Hosford v. Nichols and others*, 202

11. Where a mortgagee obtains a renewal of a lease, or any other advantage in consequence of his situation as such mortgagee, the mortgagor coming to redeem, is entitled to the benefit thereof. *Slee v. Manhattan Company*, 48

12. Where, under a statute foreclosure, the holder of the legal estate or mortgagee himself becomes the purchaser of the equity of redemption, no deed is necessary to make his title to the premises perfect. *id.*

13. In mortgage and partition sales in Chancery, if the premises are not sold at the risk of the purchaser, he will not be compelled to complete the purchase, in case the premises should be incumbered, or no title should pass by the sale, or there should be difficulty in obtaining possession. *McGowan v. Wilkins*, 120

14. A deed absolute on its face, if intended only as a mortgage or security for the payment of money, whether accompanied by a written defeasance or not, must be recorded as a mortgage in order to protect the holder against a

subsequent *bona fide* mortgagee or purchaser of the premises. *White v. Moore and others*, 551

15. If no written defeasance was executed, the holder of the mortgage may comply with the requirement of the statute at any time afterwards by executing a defeasance according to the terms agreed upon by the parties, and then recording both instruments together as a mortgage. *id.*

16. On a bill of foreclosure by a subsequent mortgagee, he will be entitled to redeem the prior mortgage, and then to sell the whole estate for the money due on both mortgages. *The Western Ins. Co. of the Village of Buffalo v. The Eagle Fire Ins. Co.* 284

17. If the prior mortgage should not be due, the junior mortgagee will be entitled to a decree for the sale of the mortgaged premises, subject to such prior mortgage. *id.*

18. H. was seized in his own right of an undivided fourth part of a tract of land, and was also seized in right of his wife of one other undivided fourth part thereof. D. & T. also each owned one undivided fourth part. The share of T. was subject to a mortgage. A voluntary partition was made of the premises between the parties, by which two lots thereof were released by D. & T. to H. and wife, and the residue was released by H. and wife to D. & T. as tenants in common, they paying to H. and wife \$675 for the difference in value. Afterwards the mortgagee, without regarding the partition, and without making H. and wife parties to the suit, foreclosed his mortgage against T. in Chancery, and sold one undivided fourth of the whole premises, leaving a balance due on the mortgage after the sale. Previous to the foreclosure, and subsequent to the partition, several judgments were recovered in the Supreme Court against T. T., after the recovery of those judgments, assigned all his property to trustees for the payment of his debts. Subsequent to this assignment, the premises released as aforesaid by H. and wife to D. & T. were sold by virtue of a decree in Chancery, obtained in a partition suit brought by one of the heirs of D. One-half of the proceeds of this partition sale had been paid to the representatives of D., one-fourth to the mortgagee of T., and the remaining one-fourth was in the hands of the master. Under these circumstances, this remaining one-fourth was decreed to be applied in satisfaction of the balance due on the mortgage against T., for the purpose of discharging the two lots released to H. and wife from the lien of that mortgage. *In the Matter of Howe*, 126

19. Had the mortgagee made H. and wife parties to the bill for foreclosure of the mortgage against T., the court would have decreed a sale only of the share assigned to T. upon the voluntary partition. The equitable rights of H. and wife were not altered or affected by the general assignment of T., for the benefit of his creditors, or by the judgments recovered against him subsequent to the voluntary partition. *id.*

20. After a decree for the foreclosure and sale of mortgaged premises, the court will control and regulate the proceedings and manner of sale, so that no injustice shall be done to either party. *Suffern v. Johnson and Peterson,* 450

21. Where mortgaged premises are an inadequate security for the debt, and the mortgagor is irresponsible, the court, although the entire mortgage debt is not due, will order the whole of the premises to be sold, or so much as is necessary to pay the whole debt and costs, unless the defendant pays to the complainant the sum which will become due before the sale, or gives ample security for payment of the residue, when it becomes due. *id.*

22. Mortgaged premises should be sold either together or in parcels, as will be best calculated to produce the highest sum. *id.*

23. Where the rights of the several defendants are truly stated in a bill of foreclosure, it is not necessary for them to appear and answer to protect their rights. *The Merchant's Insurance Co. v. Marvin and others,* 557

24. Where a defendant in a bill of foreclosure, who was not personally liable for the mortgage debt, filed a cross bill and set up a defence which was not ultimately sustained, and thus in the mean time kept possession of and received the rents and profits of the mortgaged premises, and which premises, upon a sale thereof, were found insufficient to pay the amount due, he was decreed to pay the extra costs occasioned by his defence. *The Bank of Plattsburgh and others v. Platt and others,* 464

See COSTS, 2, 15, 16, 17, 18, 30. DEBTOR AND CREDITOR, 16. EVIDENCE, 5, 13, FRAUD, 7. JUDGMENT, 11. TITLE TO REAL ESTATE, 3.

N

NE EXEAT REPUBLICA.

1. If the party against whom a final decree is made, intends to remove beyond the juris-

diction of the court before the decree can be enforced by execution, a *ne exeat* will be granted. *Dunham v. Jackson,* 629

2. A *ne exeat* is in the nature of equitable bail, and may be applied for in any stage of the suit. *id.*

3. Where a defendant in a bill for an account and payment of demands founded on contract, has been discharged under the non-imprisonment act, a writ of *ne exeat* against him will be discharged. *Ashworth and others v. Wrigley,* 301

4. The writ will not be retained on a simple affidavit that a *certiorari* has been allowed for the purpose of reversing the discharge obtained under the insolvent act. *id.*

5. This court may hold the insolvent to bail in cases of fraud. *id.*

6. But whether it would retain a *ne exeat* on an affidavit of mere irregularity in obtaining the discharge? *Quære.* *id.*

See HUSBAND AND WIFE, 17.

NOTICE.

Where a party has sufficient to put him on inquiry, it is equivalent in equity to actual notice. *Pitney v. Leonard,* 461

See JUDGMENT, 13, 19. MORTGAGE, 5, 6. WARRANTY, 2.

P

PARI MATERIA.

Separate instruments executed at the same time, and relating to the same subject matter, may be construed together and taken as one instrument. *Van Horne v. Craine,* 455

PARTIES.

1. As a general rule, a mere witness cannot be made a party defendant. *The President, Directors and Co. of the Fulton Bank v. Sharon Canal Co.* 219

2. But suits against corporations are exceptions to this rule. As they do not answer upon oath, the only means of obtaining a discovery from them is to make their officers and agents parties, and to compel such officers and agents to answer the bill. *id.*

3. The former as well as the present officers of a corporation can be made parties to a suit against such corporation, and compelled to make discovery of facts within their knowledge. *id.*

4. An assignee of an undivided moiety of leasehold premises, can maintain an action in his own name upon a covenant of warranty contained in the original lease. *Van Horne v. Craine*, 455

5. Whether he could maintain an action upon a covenant to convey without joining with the assignee of the other moiety? *Quere. id.*

6. But if the assignee of one moiety should unconscientiously refuse to join with his co-tenant in any act which would be for the common benefit of their estate, Chancery will compel him to join, or to permit the co-tenant to do it for his own benefit, if it can be done without injury to the estate. *id.*

7. Where it is sought to charge lands with a legacy, it seems that the legatee is a necessary party. *Fish v. Howland and others*, 20

8. Although one legatee may file a bill in favor of himself and all others who might choose to come in under the decree, yet the bill must state the fact that it is filed in behalf of the complainant and all others, &c. *id.*

9. Where a trustee prosecutes a claim for the benefit of the *cestui que trust*, the latter must be made a party. *id.*

10. One of two devisees cannot file a bill for an account against one of two executors, where the executors, by the will, have the charge of the real estate, without making the other devisee and executor parties. *Fabre and wife v. Colden*, 166

11. The officers of a corporation may be made parties to a bill of discovery, to enable the complainants to obtain a knowledge of facts which could not be arrived at by the answer of the corporation put in without oath. *Vermilyea v. The Fullon Bank and others*, 37

12. Where one of the executors renounces the execution of the will, the other executors may file a bill in their own name, and if it is necessary to bring the executor who refused to accept the trust before the court, he may be made a party defendant. *Thompson, ex'r, &c. v. Graham and others*, 384

See DEBTOR AND CREDITOR, 8, 9. LEGACY, 1, 2. PRACTICE, 62.

PARTITION.

1. The right of an incumbrancer can not be affected by a sale of lands in partition; neither can he be made a party to the suit. *Harwood and others v. Kirby*, 469

2. If the lands are divided, the lien of the incumbrance, after the division, will be confined to the share allotted to the party against whom the incumbrance is held. *id.*

3. If the lands are sold, the purchaser will take the premises subject to the lien of the incumbrance upon the undivided share. *id.*

4. The Revised Statutes have altered the law on this subject, and have authorized the court to decree a sale, which will give the purchaser a perfect title, discharged from all liens and incumbrances. *id.*

5. If a mortgage is given on an undivided share of the estate pending a suit for partition, the lien of the mortgagee will be divested by a sale of the premises under the decree, and the purchaser will take the estate discharged from the incumbrance. *Sears and wife v. Hyer and others*, 483

See HUSBAND AND WIFE, 10, 11, 12. MORTGAGE, 13, 18, 19.

PARTNERSHIP.

1. A surviving partner has the legal right to the partnership effects. *Cass and wife v. Abel, executor*, 393

2. But in equity he is considered merely as a trustee to pay the partnership debts, and to dispose of the partnership property for the benefit of himself and the estate of the deceased partner. *id.*

3. He cannot derive any exclusive profit from the use of the partnership funds. *id.*

PAUPERIS FORMA.

See COSTS, 13. INFANT, 3. PRACTICE, 11, 12, 13, 58.

PLEADINGS.

1. Where three kinds of relief are prayed for in the bill, and the complainant is entitled to one of them, the defendant cannot demur. *The Western Ins. Co. of, &c. v. The Eagle Fire Ins. Co. of N. Y.* 284

2. A bill of discovery will be sustained to aid the prosecution or defence of a civil suit in a foreign tribunal. *Mitchell and Nash v. Smith*, 287

3. If it appears upon the face of the supplemental bill that all the matters alleged therein arose previous to the commencement of the suit, and might have been inserted in the original bill by way of amendment, the defendant may demur. But if this irregularity does not appear upon the face of the supplemental bill, the facts may be brought before the court by plea. *Stafford and others v. Howlett and West*, 200

4. In a bill of discovery against a corporation, the corporation ought to be permitted to put in a separate answer, in order to make offers and admissions, and to deny facts which the officers may suppose do exist. *Vermilyea v. The Fulton Bank*, 37

5. Where a defendant is examined by the complainant, in relation to the amount due the complainant, on account of certain property sold by the defendant on commission, it is not sufficient for the defendant to refer to his books of account, produced before the master; but he must give the best answer he can from recollection and information, aided by a recurrence to the books and papers immediately within his control and possession, accompanied by such explanations, responsive to the questions put, as are necessary to prevent improper conclusions being drawn from his answers. *Pect v. Hamlin and others*, 247

6. Where matters charged in the bill, as the acts of the defendant himself, are of such a nature that he can be presumed to recollect them if they ever took place, a positive answer is, in general, required. *Hall v. Wood*, 404

7. But where the facts are such that it is probable he cannot recollect them so as to answer more positively, a denial of the facts, according to his knowledge, recollection and belief, will be sufficient. *id.*

8. Where one of two defendants denies in his answer all knowledge of the facts alleged in the complainant's bill, the complainant, in order to give such defendant an opportunity to litigate his rights, must file a replication to his answer. *Elliott, ex'r, v. Pell and others*, 263

See EVIDENCE, 14.

PRACTICE.

1. If an original bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill, founded upon matters which have subsequently taken place. *Candler v. Petit and others*, 168

2. Facts which existed before the filing of the original bill, should be inserted therein by way of amendment. *id.*

3. But if the original bill was sufficient for one kind of relief, and facts afterwards occur which entitle the complainant to other or more extensive relief, he may have such relief by setting out the new matter in a supplemental bill. *id.*

4. It is not necessary to obtain leave to file a bill of review, where it is brought to correct errors apparent on the face of the record. *Webb and others v. Pell and others*, 564

5. *Aliter*, where it is brought upon the discovery of a new matter. *id.*

6. Where a subpoena was taken out upon a bill of review, and a *bona fide* attempt made to serve it within five years from the entry of the original decree, it was held to be a sufficient commencement of the suit, although the subpoena was not in fact served within the time allowed by law for appealing from the decree. *id.*

7. On filing a bill of review, a deposit must be made with the register of the same amount which is required on an appeal. *id.*

8. Where the solicitor for the complainant acted under a mistake as to the practice, he was allowed after the commencement of the suit to make the deposit *nunc pro tunc*. *id.*

9. Notice of every application made to the court must be given to the opposite party, in case he has appeared, where the motion relates to any matter pending in court, or where a final order is sought, orders for time, and those of a like nature alone excepted; otherwise the applicant or petitioner will only be entitled to an order *nisi*. *Isnard v. Cazaux*, 39

10. And copies of every petition, affidavit &c., upon which the motion is founded, must be served, together with the notice of the motion. *id.*

11. Where an order had been obtained on an *ex parte* application, that the complainant

- be admitted to prosecute in *forma pauperis*, the same was vacated with costs. *id.*
12. A party must be an object of charity, otherwise the privilege of prosecuting in *forma pauperis*, will not be granted to him. *id.*
13. Applications for this privilege are not encouraged. *id.*
14. Exceptions to an answer are always referred in the first instance to a master. *Byington v. Wood*, 145
15. If either party neglects to appear before the master and argue the exceptions, he will not afterwards be permitted to bring them before the court by exceptions to the master's report. *id.*
16. No exceptions can be taken to a master's report, which are not founded upon objections distinctly taken before the master. *id.*
17. In the case of a reference to state an account, the objections to the report are taken and argued after the draft of the report is prepared. *id.*
18. In such cases, objections may be taken by a party who has not previously appeared before the master; but he cannot introduce any new matter in evidence to support such objections. *id.*
19. Where there is one general exception to the master's report, embracing all the exceptions allowed by him, and the master, in allowing the exceptions, was right as to any of them, this general exception to the masters' report will be overruled. *Noble and others v. Wilson and others*, 164
20. Where exceptions to an answer have been allowed, and the defendant on the application of the adverse party, puts in an entire new answer to the bill, the complainant has no right to treat it as an answer to the exceptions only; but if the new answer is insufficient, he must file new exceptions. *Hall v. Wood*, 404
21. Where several exceptions are taken to an answer, allowed by the master, a single exception to the report insisting upon the sufficiency of the answer generally, cannot be sustained, if any of the exceptions to the answer are well taken. *Candler v. Petit*, 427
22. If the defendant in his answer sets up a distinct matter by way of avoidance, which is not called for by the bill, the same, if irrelevant or immaterial, may be excepted to for impertinence, or the complainant may have the benefit of the objection upon the hearing. *Spencer v. Van Duzen and Jones*, 555
23. Exceptions for scandal or impertinence, under the 53d rule, must point out the exceptionable matter with sufficient certainty to enable the adverse party and the officers of the court to ascertain what particular parts of the pleading or proceeding are to be stricken out if the exceptions are allowed. *Whitmarsh v. Campbell*, 645
24. If several parts of the answer, or other proceeding, are deemed impertinent, each part should form the subject of a separate exception. *id.*
25. Where one party is examined as a witness against another party in the same cause, he may be cross-examined, like any other witness, by the party against whom he is called, and his evidence cannot be used in his own favor. *Benson and others v. Le Roy and others*, 122
26. But where a party is examined before a master in relation to his own rights, the examination is in the nature of a bill of discovery. He cannot be cross-examined by his own counsel, nor can he give evidence in his own favor any farther than his answers are responsive to the questions put to him. *id.*
27. He may, however, accompany his answer by explanations responsive to the interrogatory, which may be necessary to rebut any improper inference arising from such answer. *id.*
28. The master's certificate as to the insufficiency of an examination of a party on interrogatories, does not require an order of confirmation. *Case and wife v. Abel*, 630
29. If the master's certificate is not excepted to within eight days after notice of the filing thereof, it becomes absolute of course. *id.*
30. The practice in relation to exceptions to answers for insufficiency must be adopted and pursued, as far as the same is applicable to exceptions to the examination of a party. *id.*
31. If the examination is reported insufficient, the master may allow new interrogatories to be added by the adverse party, and the exceptions and new interrogatories must be answered together. *id.*

32. If the examination is certified by the master to be sufficient, the adverse party cannot re-examine the defendant to the same point without the permission of the court. *id.*
33. An omission of the solicitor or counsel to sign an answer will not affect the validity of a decree. *Sears and wife v. Hyer and others*, 483
34. A rehearing of a cause is not a matter of course, except in the cases provided for by the rules of the court. *Land v. Wickham*, 256
35. In other cases, a rehearing rests in the discretion of the Chancellor. *id.*
36. Where a decree of one Chancellor is reversed by his successor in office, a rehearing will be granted by a third Chancellor, on cause shown. *id.*
37. If a motion for a rehearing is made for delay, it will be refused. *id.*
38. Where, upon the hearing of a cause the counsel for the defendants abandoned the defence, after hearing the opening argument in behalf of the complainants, the court refused to grant a rehearing upon the ordinary certificate of counsel. *De Carters and others v. La Farge and others*, 574
39. To obtain a rehearing under such circumstances, the defendants will be required to show a violation of duty on the part of their counsel, or that he had clearly mistaken either the law or the facts. *id.*
40. A party who cannot be presumed to have positive knowledge of a fact, may swear according to his information and belief; and if it be not denied by the adverse party, who can swear positively upon the subject, it will be deemed as admitted. *Attorney-General v. Bank of Columbia*, 511
41. An injunction bill will not be amended, unless the proposed amendments are distinctly stated to the court, and verified by the oath of the complainant; nor unless a sufficient excuse is rendered for not incorporating them in the original bill. *Rodgers v. Rodgers*, 424
42. The application to amend must be made as soon as the necessity of the amendment is discovered. *id.*
43. Amendments to a bill, when allowed, are always considered as forming part of the original bill. They refer to the time of filing the bill, and the defendant cannot be required to answer any thing which has arisen since that time. *Hurd and Sewall v. Everett*, 124
44. Under the general rule of the court, allowing the complainant to amend upon an insufficient answer, he cannot amend by leaving out the name of the defendant; and thus discontinue the suit against him without costs. *Chase v. Dunham and others*, 572
45. An original bill cannot be amended by incorporating therein any thing which arose subsequent to the commencement of the suit. This should be stated in a supplemental bill. *Stafford and others v. Howlett and West*, 200
46. All matters which arose previous to the filing of the original bill, although discovered afterwards, should be introduced into the same by way of amendment, if the cause is in a stage in which an amendment is allowable. *id.*
47. If the cause has progressed so far that an amendment cannot be made, or if material facts have occurred subsequent to the commencement of the suit, the court will give the complainant leave to file a supplemental bill. *id.*
48. And where such leave is given, the court will permit other matters to be introduced into the supplemental bill, which might have been incorporated in the original bill by way of amendment. *id.*
49. A motion to dismiss a bill for want of prosecution, can only be made where there are other defendants against whom the cause is not in readiness for a hearing in consequence of the neglect of the complainant to expedite the proceedings against them. *Whitney v. The Mayor, Ald. and Com. of the City of New York*, 548
50. Where both parties have the right to bring the cause to a hearing, a motion to dismiss the bill for want of prosecution is irregular. *id.*
51. Where a defendant in his answer only denies a fact charged in the bill, according to the best of his knowledge and belief, a single witness on the part of the complainant is sufficient to establish the fact. *Knickerbacker v. Harris*, 209
52. If the complainant wishes to compel the defendant to state the new matter set up by way of defence with more particularity, he should amend his bill and state the matter by way of pretences, and call upon the defendant to answer as to the particulars. *Spencer v. Van Duzen and Jones*, 555

53. If the complainant wishes to prove any fact on the hearing, not admitted by the answer, he must file a replication to the answer. *Mills and Minton v. Pittman*, 490
54. Where the fact to be proved is a matter of record, the complainant after filing his replication may give notice of his intention to produce the record, or an exemplification thereof at the hearing, and then obtain his orders to produce witnesses and close the proofs in the usual manner. *id.*
55. The subpoena for a better answer may be taken out immediately on filing the master's report, and may be served on the solicitor. *Richards v. Barlow and others*, 323
56. The subpoena for costs must be served on the defendant in person, and the amount of costs, as ascertained on taxation, must be inserted therein. *id.*
57. Where a suit was commenced in this court in consequence of an inequitable defence interposed to a suit at law for the same cause of action, the court refused to compel the complainant to elect in which suit he would proceed, as long as no attempt was made to prosecute the suit at law. *Thompson, ex'r. v. Graham and others*, 452
58. Whether, under the statute of this state, a party can be admitted in any case to defend *in forma pauperis*? *Quere. Brown v. Story*, 588
59. A decree can only be questioned by a bill of review. *Elliott, ex'r v. Pell and others*, 263
60. A decree between co-defendants may be made, grounded upon the pleadings and proofs between the complainants and defendants. *id.*
61. But such decree, to be binding, must be founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants. *id.*
62. No decree will be made for the distribution of a fund in court, unless all the parties interested in the fund are brought before the court. *De La Vergne v. Everton and others*, 181
63. Where a party delayed a year and six months in applying to the Chancellor to correct a mistake made in drawing up a decree, leave to amend the decree was refused. *Rodgers v. Rodgers*, 188
64. A decree, made upon bill and answer, cannot affect the rights of any of the parties, as to other matters which were not the subject of litigation in that suit. *Elliott, ex'r v. Pell and others*, 263
65. A suit cannot be brought in the name of a *feme covert* without her consent; and when brought with her consent, the *procurator* may be changed on her application, the person substituted giving his security for the costs already accrued. *Pullon and others v. Roosevelt*, 178
66. Where notice of the order to produce witnesses has been served upon the agent of the solicitor for the opposite party, each party has double the usual time to produce his witnesses. *James v. Berry and others*, 647
67. If the adverse party wishes to shorten the time, he must obtain an order upon his part and serve notice thereof upon the opposite solicitor, either personally or by leaving the same at his office. *id.*
68. Where only part of the money secured by a mortgage is due, and the bill is taken as confessed, the reference to ascertain whether the premises can be sold in parcels is a common order. *Everitt v. Hoffman and others*, 648
69. An order to examine a complainant, as to any payments received by him, where the defendant is either absent, concealed or a non-resident, is a common order; but an order for leave to examine a complainant in his own favor can only be obtained upon a special application. *Southwick v. Van Bursum and others*, 648

See APPEAL, 1, 2, 3, 6, 7. CONTEMPT, 1, 2. CORPORATIONS, 24, 25. COSTS, 1, 2, 26, 29. EVIDENCE, 11. HUSBAND AND WIFE, 13, 14, 15. LEGACY, 4, 5, 6. RECEIVER, 6, 7, 8, 9, 10. USURY, 6, 7, 8.

PRINCIPAL AND AGENT.

1. Where a person was entitled to a share of the personal estate of an intestate and the agent of other persons entitled also to portions of such estate had received all the proceeds of the same and remitted the whole to his principals, and afterwards there came into his hands a portion of the proceeds of the real estate which belonged wholly to his principals, it was held that such person, whose share of the personal estate had been so paid by such agent to his principals, had an equitable claim upon the proceeds of the real estate in the

hands of the agent. *Duffy and others v. Buchanan and others*, 453

2. The agent is not liable for the payment to his principals of the share of the personal estate which did not belong to them, having paid the same without notice. *id.*

3. The remedy of the person entitled to the share of the personal estate so paid by mistake to the principals, is against such principals or the personal representatives of the intestate. *id.*

PROXY.

See CORPORATIONS, 12.

R

RECEIVER.

1. Where a debtor, in failing circumstances, assigns his property to a person who is insolvent, in trust for his creditors, a receiver will be appointed upon the application of such creditors to take charge of the property so assigned. *Haggarty and others v. Pitman, Strong and Bovee*, 298

2. Upon proceedings against a bank, under the statute for insolvency, an officer of the corporation is not a proper person to be appointed the receiver. *Attorney-General v. The Bank of Columbia*, 511

3. Where the corporation appealed from the decision of the court both as to the appointment of a receiver and as to the principle adopted of excluding its officers from the appointment, the court would not, pending the appeal, appoint a receiver, as long as there was no ground to apprehend danger to the fund before a decision could be had on the appeal. *id.*

4. Where there has been negligence or improper conduct on the part of a trustee, and the fund is in danger, the appointment of a receiver upon the application of the *cestui que trust* is a matter of right. *Jenkins and others v. Jenkins and others*, 243

5. Where the holders of a majority of the stock of the corporation neglect to choose officers to take charge of the property of the corporation, a receiver will be appointed, upon the application of the owners of a minority of the stock, to take possession of the effects of the corporation and to preserve the same for the benefit of the stockholders generally. *Lawrence v. The Greenwich Fire Ins. Co.* 581

6. As a general rule, a receiver should not be appointed without notice to the parties interested. *The People v. Norton and others*, 17

7. But this rule is subject to exceptions in special cases, where irreparable injury would be sustained by the delay. *id.*

8. So a receiver will be appointed without notice, upon the application of the complainant, where the defendant has absconded, to prevent service of the subpoena to appear and answer the bill: or has left the state, and is not expected to return for several months, and has no residence or place of business where a subpoena can be served. *id.*

9. The defendant, however, has a right afterwards, to apply for relief against the order appointing such receiver. *id.*

10. Form of order appointing a receiver. *In the Matter of the Franklin Bank*, 85

See CORPORATIONS, 19, 20.

REHEARING.

See PRACTICE, 34, 35, 36, 37, 38, 39.

REMOVAL OF CAUSES.

1. A suit in a state court will not be removed into the Circuit Court of the U. S., unless the latter court has jurisdiction of the subject matter of the suit, and has the power of doing substantial justice between the parties. *Rodgers v. Rodgers*, 183

2. Where N. R. commenced suits at law in the Superior Court of the city of New York, against H. R., and H. R. filed a bill in Chancery to obtain an injunction restraining the proceedings at law, it was held, that the suit in Chancery could not be removed into the Circuit Court of the United States, inasmuch as such a removal would leave H. R. without remedy; the Circuit Court of the United States having no power to restrain the proceedings at law. *id.*

RIVER.

As a general rule, persons who own the lands on the different sides of a private stream, hold to the middle of the stream. *Arthur and Wright v. Case and Harwood*, 447

S

SET-OFF.

1. Demands, in reference to off-set, are considered due to and from the same persons, in the same right where the plaintiff may sue and the defendant be sued in their own names, without specifying any representative character, and where the party to the suit has a lien upon, or a legal right to the application of the fund when collected. *Miller v. Receiver of the Franklin Bank*, 444

2. The public administrator of the city of New York is entitled to off set against a debt due from him to a bank, a demand for deposits in the bank, whether made in his own name or as public administrator, and also the bills of the institution in his hands. *id.*

3. The right of a debtor to a bank to off set any demand he held against the bank at the time it stopped payment, is not altered by the appointment of a receiver. *In the Matter of the Receiver of the Middle District Bank*, 585

4. If the receiver is compelled to resort to an indorser, where the real debtor is unable to pay, such indorser can off set the bills of the bank which he held at the time it stopped payment, unless he is indemnified by the real debtor. *id.*

5. Where bills of a bank are obtained by one of its debtors after it stops payment, they cannot be set off by such debtor against the debt he owes the bank. *id.*

6. A debtor to a bank, whose charter is repealed, has an equitable right to off set every demand which he had against the bank at the time of the repeal of its charter, but not demands which he afterwards purchased. *McLaren v. Pennington and others*, 102

7. A party against whom a decree for costs has been made will not be permitted to off set against such costs a decree or judgment in his favor in relation to a distinct matter, to the prejudice of the solicitor's lien. *Dunkin v. Vandenberg*, 622

8. But where different claims arise in the course of the same suit, or in relation to the same matter, they may be arranged and off set agreeable to equity without reference to the lien of the solicitor. *id.*

9. The solicitor's lien is only on the clear balance due to his client after all the equities arising out of that particular litigation are settled. *id.*

10. The Court of Chancery will not on motion allow a debt which is not ascertained by judgment or decree to be off set against a decree for costs, to the prejudice of the solicitor's lien: although the validity of the debt is admitted by the client. *id.*

11. The power of the Court of Chancery to off set one judgment or decree against another, on motion, is the same as that of the common law courts. But on a bill filed for an off-set, the jurisdiction of the Court of Chancery is more extensive than that of the common law courts. *id.*

12. A party cannot set off a judgment, unless he is the beneficial, as well as the nominal owner of it. *Aiken and Ten Eyck v. Satterlee and Satterlee*, 259

13. Where A. indemnified T., a sheriff, against selling S.'s goods, for which S. recovered a judgment against T.; held, that A. and T. could not set off against S. a judgment which A. had purchased for less than one-third of its amount, and taken an assignment of it in the sheriff's name. *id.*

14. A defendant, in a suit at law, who has a separate demand against the plaintiff which is not a subject of off-set there, cannot have relief in Chancery unless the plaintiff is insolvent. *Reed v. The Bank of Newburgh*, 215

15. But if his demand arises out of the same transaction as that of the plaintiff, so that in equity the plaintiff would have no right to recover against him, and the defendant cannot avail himself of his defence at law, he will be relieved in Chancery. *id.*

See JURISDICTION IN CHANCERY, 20.

SPECIFIC PERFORMANCE.

See AGREEMENT, 6, 7. HUSBAND AND WIFE, 8.

STATUTES.

1. Under the act of the 12th of April, 1816, for draining the great marsh or swamp on the Canasara Creek, in the towns of Sullivan and Lenox, in the county of Madison, the proprietors of the lands overflowed by that creek have a right to drain the marsh according to the provisions of the act, although in so doing they would divert the water from the mill of the complainants, which is situated on the Chittenango Creek; inasmuch as at the time the act was passed they could have drained the marsh in the manner contemplated by that act,

without injuring the mill of the complainants on the stream below; since which time, the greater portion of the waters of the Chittotingo Creek have been diverted by the state to supply the Erie canal. By the 5th section of the act, the complainants have a complete remedy against the proprietors of the land to be benefited, for all damages they may sustain in consequence of the draining of the marsh. *French and another v. Kirkland and others*, 117

2. Whether they would have such remedy against the state? *Quere.* *id.*

3. The object of the law of Congress organizing the board of Florida commissioners, was to ascertain who were entitled to indemnity against the Spanish government; not to investigate all the various equities which might arise as to the distribution of the fund awarded for any particular injury. *Delafield and others v. Colden and others*, 139

4. The act of March 6, 1807, to raise moneys to drain the drowned lands in the county of Orange, gives the right of voting for commissioners under the act only to the persons who own lands in fee. *Philips and others v. Wickham and others*, 590

See JURISDICTION IN CHANCERY, 7, 8, 13.

SUPREME COURT.

1. The power to review and correct the errors, abuses and mistakes of public officers and of inferior or subordinate jurisdictions, belongs exclusively to the Supreme Court. *Whitney v. The Mayor, Aldermen, &c., of the city of N. Y.* 548

2. Illegality in the proceedings upon assessments for the purpose of regulating and improving streets in the city of New York, may be corrected by a *certiorari* to the Supreme Court. *id.*

See JURISDICTION IN CHANCERY, 4, 5.

SURROGATES.

1. Surrogates, having exclusive jurisdiction in relation to the proof of wills of personal property, must determine all questions of fraud, imposition and undue influence in procuring such wills, as well as the general question of the capacity of the testator. *Clark and others v. Fisher and others*, 171

2. When executors or administrators are cited to account before a surrogate, it is the

duty of the complainants, when required, to file a written allegation or libel stating the substance of their claims against the defendants. *Foster and Bouck, ex'rs v. Wilber and Olmstead*, 537

3. The defendants may call on the surrogate to reject the allegation for insufficiency, or they may take issue upon the facts propounded, or put in a counter allegation in the nature of a plea in bar. *id.*

4. The surrogate before whom the will was proved, or by whom administration was granted, has power upon the application of the legatees or next of kin, to compel executors as well as administrators to account and to distribute the personal estate according to law or the directions of the testator. *id.*

5. No surrogate can call executors or administrators to account, except where probate of the will or letters of administration were granted by him. *id.*

6. Whether a surrogate can compel an account from the personal representatives of a deceased executor or administrator, although probate or administration of both estates were granted by him, unless some portion of the first estate actually came to the hands of such representatives? *Quere.* *id.*

7. Where a person appears before a surrogate to oppose probate of a will, he is bound, if required by the adverse party, to propound his interest, or show his right to contest the will. *The Public Adm'r of N. Y. v. Watts and Le Roy*, 347

8. If issue is taken on the allegation of interest, the evidence in relation to that question and that which relates to the validity of the will should proceed *pari passu*. *id.*

9. A person claiming as next of kin should in his allegation of interest show how he was related to the deceased. *id.*

10. An allegation, by a party coming to contest a will, that he is nearer of kin to the deceased than any other person residing in the United States, is not sufficient. *id.*

See APPEAL, 4, 5.

T

TENANT FOR LIFE.

A tenant for life has the right to take from the premises reasonable firewood for the use

not only of the house which she herself occupies, but also sufficient to supply the house of her servant who cultivates the land, provided it can be done without injury to the inheritance. *Gardiner v. Derring and Hempstead*, 573

in his claim and contest his right before the commissioners; that the person who received the money awarded, was a trustee, and accountable in equity to the real parties interested in the fund. *Delafield and others v. Cadden and others*, 139

TITLE TO REAL ESTATE

1. Where a person enters into possession of land under a conveyance from one claiming the title, such title is presumed to be good until the contrary is shown. *Pitney v. Leonard and Leonard*, 461

2. Title to real estate can only be acquired or lost according to the law of the place where it is situated. *Hosford v. Nichols*, 220

3. This rule applies to mortgages as well as to deeds absolute. *id.*

TRUST AND TRUSTEE

1. No resulting trust can be raised in favor of a grantor in opposition to the express terms of his conveyance. *Squire and wife v. Harder and others*, 494

2. Where the grantor conveys in fee with warranty, he is estopped from alleging that he had an interest in the purchase-money which created a resulting trust in his favor. *id.*

3. An executor or trustee cannot purchase the trust property from his co-executor or trustee without being liable for the profits arising from the property purchased. *Case and wife v. Abel, ex'r*, 393

4. It is the duty of executors and trustees to keep the trust fund separate and distinct from their private funds. *id.*

5. If they use the trust funds or mix them with their private funds, they will be made liable for all losses which may arise from their neglect or mismanagement. *id.*

6. A trustee in the possession of land is required to account to the *cetui que trust*, not only for the rents and profits actually received, but also for the rents and profits which might have been received. *Rodgers v. Rodgers*, 183

7. Where money was awarded by the Florida commissioners upon a memorial of one of two joint owners, and the applicant claimed in his memorial the whole to himself, without naming his joint owner, it was held that the joint owner not named, was not bound to put

8. The assignment by a trustee, as security for his private debt, of a bond and mortgage belonging to the trust fund, will make such trustee chargeable for the value of such bond and mortgage at the time of such assignment, with interest thereon. *Van Rensselaer and others v. Morris*, *id.*

9. And such trustee will be so chargeable, although the mortgagor should, subsequent to such assignment, become insolvent, and the mortgaged premises be insufficient to discharge the mortgage debt. *id.*

See CORPORATIONS, 17, 18, 26. FRAUD, 10. JUDGMENT, 11. RECEIVER, 4.

U

USURY.

1. Where M. being in embarrassed circumstances and pressed with executions against him, applied to S. for a loan of \$800, and S. refused the loan unless M. would consent to purchase from him 124 acres of wild land at \$550, which was much above its real value, and M. finally accepted this proposition and gave S. a bond and mortgage for \$1,350, payable in 12 equal annual instalments, with annual interest, it was held that this loan was usurious. *Morgan v. Schermerhorn*, 344

2. Where a contract for the sale of land in this state was made between two of its citizens, one of whom removed to Pennsylvania, where the contract was afterwards executed by giving a deed and taking a mortgage on the premises to secure the payment of the purchase-money, in which mortgage the New York rate of interest was reserved, which was greater than that of Pennsylvania, it was held that the giving the deed and taking the mortgage was only a consummation of the original contract made in this state, and that the mortgage was not void for usury. *Hosford v. Nichols and others*, *id.*

3. Whether a contract made in this state for the sale of lands in another state, and credit, reserving interest at the legal rate of the state where the lands are situated, would be void if the rate of interest exceeded that allowed by our laws? *Quere.* *id.*

4. A party who comes to Chancery for relief against an usurious contract must pay or offer to pay the amount actually due, before he will be entitled to an injunction to restrain proceedings at law, or to an answer as to the alleged usury. *Morgan v. Schermerhorn*, 544

5. But if the defendant puts in his answer without making this objection, the court will not afterwards dissolve the injunction, if the complainant is still willing to pay the amount actually due. *id.*

6. Where a party comes to Chancery to avoid a usurious contract, he must consent to pay the sum actually loaned, with interest, or the court will not grant him any relief. *Fulton Bank v. Beach*, 429

7. And where the proofs in a cause are regularly closed, the court will not open them to enable the defendant to re-examine a witness in order to establish the usury, unless he agrees to pay the sum actually lent. *id.*

8. So the court will not allow an answer to be amended for the purpose of setting up a defence of usury, unless the defendant consents to pay the amount equitably due. *id.*

V

VENDOR AND PURCHASER.

Where a merchant contracted for goods, the price to be secured by his note indorsed by B. and C., and the goods in the meantime were forwarded to his residence, held, that the property was not changed until the delivery of the note, and that B. & C. to whom he had assigned the goods to secure an antecedent debt, could not hold them against the vendor. *Keeler and Freeman v. Field and others*, 312

See AGREEMENT, 2, 3, 4, 5. FRAUD, 4, 5, 6, 9. JUDGMENT, 1, 2, 3, 4, 5, 6, 8, 9. LIEN, 1, 2, 3, 4.

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WARRANTY.

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2. And where the premises have been conveyed by the grantee to a bona fide purchaser without notice, the original grantor cannot set up against such purchase fraud or mistake

in the insertion of the covenant of warranty in the original deed of conveyance. *id.*

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1. Where the testator gave his real and personal estate to executors in trust, to and for the uses mentioned in the will, and then directed them to pay certain annuities to his wife and children during life, and the income of the estate was insufficient to pay all the annuities, it was held, that the executors were authorized to sell such part of the estate as would be necessary to raise a sufficient sum to purchase the annuities given in the will. *Bradhurst and others, ex'rs v. Bradhurst and others*, 331

2. Where one-third of a lot of land was devised by a husband to his wife for life in lieu of dower, and after his death his daughter purchased the lot subject to the life estate of her mother, and then died leaving a will duly executed, by which she directed her executors to lease all her real estate, not before devised, and out of the rents to pay her mother, and several other persons, annuities for life; held, that the mother was entitled to both the annuity and the life estate in one-third of the lot. *Harrington v. Cannon and Hughes*, 569

3. *Aliter*, if the daughter had directed the annuity to be paid out of the rents of the whole lot. *id.*

4. Where an annuity is given by will to a man and his heirs in perpetuity, he acquires an absolute interest therein, and becomes entitled to the complete disposition of the fund set aside to produce the annuity. *Bradhurst and others, ex'rs v. Bradhurst and others*, 331

5. If the annuity be given to a man and the heirs of his body, it is in the nature of an estate tail; and to prevent a perpetuity, the common law gives him an absolute interest in the annuity. *id.*

6. The rule is the same as to annuities given by a will, whether payable out of real or personal estate. *id.*

7. Where there is a limitation over of an annuity upon the failure of issue, at the death of the annuitant, the limitation over is good, being in the nature of an executory devise. *id.*

8. Where there is a general residuary clause in a will, if a specific legacy is revoked, or bo

not only of the house which she herself occupies, but also sufficient to supply the house of her servant who cultivates the land, provided it can be done without injury to the inheritance. *Gardiner v. Derring and Hempstead*, 573

in his claim and contest his right before the commissioners; that the person who received the money awarded, was a trustee, and accountable in equity to the real parties interested in the fund. *De lafield and others v. Cokden and others*, 139

TITLE TO REAL ESTATE.

1. Where a person enters into possession of land under a conveyance from one claiming the title, such title is presumed to be good until the contrary is shown. *Pitney v. Leonard and Leonard*, 461

2. Title to real estate can only be acquired or lost according to the law of the place where it is situated. *Hosford v. Nichols*, 220

3. This rule applies to mortgages as well as to deeds absolute. *id.*

8. The assignment by a trustee, as security for his private debt, of a bond and mortgage belonging to the trust fund, will make such trustee chargeable for the value of such bond and mortgage at the time of such assignment with interest thereon. *Van Rensselaer and others v. Morris*, *id.*

9. And such trustee will be so chargeable, although the mortgagor should, subsequent to such assignment, become insolvent, and the mortgaged premises be insufficient to discharge the mortgage debt. *id.*

See CORPORATIONS, 17, 18, 26. FRAUD, 10. JUDGMENT, 11. RECEIVER, 4.

TRUST AND TRUSTEE.

1. No resulting trust can be raised in favor of a grantor in opposition to the express terms of his conveyance. *Squire and wife v. Harder and others*, 494

2. Where the grantor conveys in fee with warranty, he is estopped from alleging that he had an interest in the purchase-money which created a resulting trust in his favor. *id.*

3. An executor or trustee cannot purchase the trust property from his co-executor or trustee without being liable for the profits arising from the property purchased. *Case and wife v. Abel, ex'r*, 393

4. It is the duty of executors and trustees to keep the trust fund separate and distinct from their private funds. *id.*

5. If they use the trust funds or mix them with their private funds, they will be made liable for all losses which may arise from their neglect or mismanagement. *id.*

6. A trustee in the possession of land is required to account to the *cestui que trust*, not only for the rents and profits actually received, but also for the rents and profits which might have been received. *Rodgers v. Rodgers*, 188

7. Where money was awarded by the Florida commissioners upon a memorial of one of two joint owners, and the applicant claimed in his memorial the whole to himself, without naming his joint owner, it was held that the joint owner not named, was not bound to put

U USURY.

1. Where M. being in embarrassed circumstances and pressed with executions against him, applied to S. for a loan of \$800, and S. refused the loan unless M. would consent to purchase from him 124 acres of wild land at \$550, which was much above its real value, and M. finally accepted this proposition and gave S. a bond and mortgage for \$1,350, payable in 12 equal annual instalments, with annual interest, it was held that this loan was usurious. *Morgan v. Schermerhorn*, 544

2. Where a contract for the sale of land in this state was made between two of its citizens, one of whom removed to Pennsylvania, where the contract was afterwards executed, by giving a deed and taking a mortgage on the premises to secure the payment of the purchase-money, in which mortgage the New York rate of interest was reserved, which was greater than that of Pennsylvania, it was held that the giving the deed and taking the mortgage was only a consummation of the original contract made in this state, and that the mortgage was not void for usury. *Hosford v. Nichols and others*, 220

3. Whether a contract made in this state for the sale of lands in another state, upon credit, reserving interest at the legal rate of the state where the lands are situated, would be void if the rate of interest exceeded that allowed by our laws? *Quare. j.* *id.*

4. A party who comes to Chancery for relief against an usurious contract must pay or offer to pay the amount actually due, before he will be entitled to an injunction to restrain proceedings at law, or to an answer as to the alleged usury. *Morgan v. Schermerhorn*, 544

5. But if the defendant puts in his answer without making this objection, the court will not afterwards dissolve the injunction, if the complainant is still willing to pay the amount actually due. *id.*

6. Where a party comes to Chancery to avoid a usurious contract, he must consent to pay the sum actually loaned, with interest, or the court will not grant him any relief. *Fulton Bank v. Beach*, 429

7. And where the proofs in a cause are regularly closed, the court will not open them to enable the defendant to re-examine a witness in order to establish the usury, unless he agrees to pay the sum actually lent. *id.*

8. So the court will not allow an answer to be amended for the purpose of setting up a defence of usury, unless the defendant consents to pay the amount equitably due. *id.*

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comes lapsed, it falls into the residue, to be disposed of under the general clause; but if the residue is given to several persons in common, and one of them dies, or his legacy is revoked, his share will go to the next of kin, and not to the other residuary legatees. *Floyd and Floyd v. Barker and Ferris*, 480

9. Where A. by his will devised the use of his farm to his son and nephew for three years, and directed his executors at the expiration of the term to sell the farm and divide the proceeds among his five children; and also declared in his will, that if any one of his children died before him, leaving no children, or should die after his decease, leaving no children, without having disposed of his or her share, that the share of such child should go to the survivors; but if any of the testator's children should die leaving children, then such children were to have the share of their parent in the same manner as such parent if living would have taken the same; and the son died within the three years leaving children; it was held that the children took under the will and not as heirs of their father, and that their mother was not entitled to dower in the farm, and that the creditors of the son had no claim upon that share of the estate for the payment of their debts. The death of the son before the expiration of the three years and before the executors were authorized to sell, divested his interest, and the executory limitation over to his children immediately took effect. *Adams v. Beekman and others*, 631

10. A testamentary paper, purporting to be a will of real and personal estate, was prepared by the testator, in his own hand writing, with an attestation clause, and leaving blanks for the date, and upon his death, twenty-seven years afterwards, it was found among his valuable papers in this state, without subscribing witnesses, date or signature; held, that it was an unexecuted and unfinished instrument, and was not a valid will of personal estate. *The Public Adm'r of New York v. Watts and Le Roy*, 347

11. Where from an inspection of a testamentary paper or otherwise, it appears that the deceased intended the same to operate as his will, without any further act on his part and without the addition of any other formalities, it is a valid will of personal property. *id.*

12. But if some other act or formality was supposed necessary by the testator, or was intended to be done and observed by him, it is an unfinished or unexecuted will, and is not valid unless the testator was arrested by

death before he had a reasonable time to complete his will in the manner intended. *id.*

13. A person, to be capable of making a will, must be possessed of a sound and disposing mind and memory, so as to be able to make a testamentary disposition of his property with sense and judgment, in reference to the situation and amount of such property and the relative claims of the different persons who are or might be the objects of his bounty. *Clark and others v. Fisher and others*, 171

14. Where the derangement or loss of the powers of mind some time previous to the making of the will is established, it devolves upon the party who seeks to maintain the will to show that such incapacity had ceased at the time it was executed. *id.*

15. In forming an opinion of the state of the testator's mind, it is proper to take into consideration the reasonableness of the will in reference to the amount of his property and the situation of his relatives. *id.*

16. Whenever a person, whose mind is imbecile from disease, is induced by fraud, imposition, or undue influence, to make a testamentary disposition of his property different from what he would have done in the full possession of his faculties, the same will be set aside. *id.*

See LEGACY, 8. SURROGATES, 7, 8, 9, 10.

WITNESS.

1. Under the act to perpetuate the testimony of witnesses, (1 R. L. 454,) a witness is bound to give evidence in the same case and to the same extent that he would be, were he called as a witness upon the trial of the cause. *In the Matter of Kip*, 601

2. The act does not authorize the examination of a witness who could not be compelled to testify upon the trial. *id.*

3. No witness is bound to answer a question, which would either criminate himself, render him infamous, or subject him to a penalty or forfeiture. *id.*

4. A witness who is neither a nominal nor real party to the suit, is not excused from giving evidence, although his testimony might be used against him in a civil suit; unless it will subject him to some loss or disadvantage in the nature of a penalty or forfeiture. *id.*

5. Where the only interest a witness has in a cause in which he is sworn, is in the question, the objection goes to his credibility, and not to his competency. *McClaren v. Hopkins*, 18
6. An interest to exclude a witness from being sworn, must be a direct interest in the event of the suit. *id.*
7. Where M. purchased the interest of C. in certain mortgaged premises under a judgment and execution, in a suit by M. against H., who pretended to hold a subsisting mortgage against the premises given by C., it was held that C. on being released by M., was a competent witness to prove that the mortgage had been paid. *id.*
8. A purchaser with full knowledge of the claim of third persons, is an incompetent witness for the vendor in a suit between him and such persons. *Brown v. Lynch and Lynch*, 147
- See CORPORATIONS, 13, 16, 25. PRACTICE, 25, 26, 27, 51. USURY, 7.

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Exc. J. L.

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